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In the Supreme Court of the United States

December Term, 1987

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA STATE POLICE and the COMMISSIONER OF THE PENNSYLVANIA STATE POLICE,
Petitioners

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and LIEUTENANT OTTO J. BINKER,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS FOR REVIEW

1. Did the Court of Appeals err in establishing a rule in age discrimination cases that an employer must enforce specific minimum standards of fitness against all employees before that employer may treat age as a bona fide occupational qualification?

2. Is a District Court's ultimate finding of a BFOQ not clearly erroneous where the Court specifically finds that over-age employees are significantly less likely than younger employees to be capable of performing tasks proven to be necessary to preserve public safety, that individualized testing of capabilities is not administratively or financially feasible, and that the employer makes considerable efforts—short of enforcement of specific standards through individualized testing and sanctions—to assure that employees are fit?

TABLE OF CONTENTS

	Page
Questions for Review	i
Table of Contents	ii
Table of Citations	iii
Opinions of the Courts Below	2
Statement of Jurisdiction	2
Statutory Provisions Involved	3
Statement of the Case	5
Reasons for Granting the Writ	10
Conclusion	23
Appendix:	
Opinion of the United States Court of Appeals for the Third Circuit	1a
Opinion of the United States District Court for the Middle District of Pennsylvania, Civil No. 83-0321	11a
Order, dated October 22, 1986	36a
Judgment of the United States Court of Appeals for the Third Circuit	37a
Order of The United States Court of Appeals for the Third Circuit, Sur Petition for Rehearing	39a

TABLE OF CITATIONS

CASES:

EEOC v. City of Bowling Green, 607 F. Supp. 524 (D. Ky. 1985) 5

EEOC v. City of East Providence, 798 F.2d 524 (1st Cir. 1986) 5, 8, 12

EEOC v. City of Pittsburgh, No. 83-2712 (W.D. Pa.) 21

EEOC v. Florida Highway Patrol, 660 F. Supp. 1104 (N.D. Fla. 1986) 5

EEOC v. Kentucky State Police, 43 FEP Cases 1045 (E.D. Ken. 1986), *appeal docketed*, No. 87-5193 (6th Cir.) 5, 21

EEOC v. Mississippi, 654 F. Supp. 1168 (S.D. Miss. 1987), *appeal docketed*, No. 87-4214 (5th Cir.) 5, 21

EEOC v. Missouri Highway Patrol, 748 F.2d 447 (8th Cir. 1984), *cert. denied*, 474 U.S. 828 (1985) 5, 8, 13

EEOC v. New Jersey, 631 F. Supp. 1506 (D.N.J. 1986), *sum. aff'd*, 815 F.2d 694 (3d Cir. 1987) 5, 18

EEOC v. New York, No. 83-CIV-8984 (M.D. N.Y.) 21

EEOC v. Tennessee Wildlife Resource Agency, No. 81-3461 (M.D. Tenn. March 7, 1986), *appeal docketed*, No. 86-5539 (6th Cir.) ... 5, 21

EEOC v. Trabucco, 791 F.2d 1 (1st Cir. 1986). 5

EEOC v. University of Texas Health Science Center, 710 F.2d 1091 (5th Cir. 1983) 14

EEOC v. Vermont Dep't of Public Safety, Nos. 83-460, 84-241 & 85-166 (D. Vt.) 21

Heiar v. Crawford County Wisconsin, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985) 14

Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) 10

Western Airlines v. Criswell, 472 U.S. 400 (1985) 10

STATUTES:

The Administrative Code of 1929, as amended, Art. II, §205(d) (unofficially codified at Pa. Stat. Ann. tit. 71, §65 (Purdons 1962)) 4

The Age Discrimination Employment Amendments of 1986, P.L. No. 99-592, §3(a), (b), 100 Stat. 3342 (codified at 29 U.S.C.A. 623(i) & note (West Supp. 1987)) 3, 21

The Age Discrimination in Employment Act of 1967, P.L. 90-202, §4, 81 Stat. 603, as amended (codified at 29 U.S.C. §623 (1986)) 3

28 U.S.C. §1254(1) (1986) 2

28 U.S.C. §1291 (1986) 5

28 U.S.C. §1331 (1986) 5

29 U.S.C. §634 (1986) 5

No. 87-

IN THE SUPREME COURT OF THE UNITED STATES

December Term, 1987

COMMONWEALTH OF PENNSYLVANIA, et al.,
Petitioners

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, the Commonwealth of Pennsylvania, Pennsylvania State Police, and the Commissioner of the Pennsylvania State Police, hereby respectfully petition this Court that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which was entered in this case on September 21, 1987.

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals for the Third Circuit has not yet been reported but is set out in the Appendix at 1a. The opinion of the United States District Court for the Middle District of Pennsylvania is reported at 645 F. Supp. 1545 (M.D. Pa. 1986) (App. 11a).

In addition, an earlier decision of the District Court is reported at 596 F. Supp. 1333 (M.D. Pa. 1984). That decision was also appealed, and the Third Circuit remanded in a decision reported at 768 F.2d 514 (3d Cir. 1985).

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on September 21, 1987. It denied a petition for rehearing on October 19, 1987 with Judge Becker and Judge Greenberg dissenting. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1) (1986).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination In Employment Act of 1967, P.L. 90-202, §4, 81 Stat. 603, as amended (codified at 29 U.S.C. §623 (1986)) provides in pertinent part:

> (a) It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age,
>
> * * *
>
> (f) It shall not be unlawful for an employer, employment agency or labor organization—(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. . . .

The Age Discrimination Employment Amendments of 1986, P.L. No. 99-592, §3 (a), (b), 100 Stat. 3342 (codified at 29 U.S.C.A. 623 (i) & note (West Supp. 1987)) provides in pertinent part:

> (a) It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act.

(b) The amendment made by subsection (a) of this section [adding subsec. (i) in codification] is repealed December 31, 1993.

The Administrative Code of 1929, as amended, Art. II, §205(d) (unofficially codified at Pa. Stat. Ann. tit. 71, §65 (Purdons 1962)), provides in pertinent part:

> Any member of the Pennsylvania State Police, except the Commissioner and Deputy Commissioner, regardless of rank, who has attained or who shall attain the age of sixty years, shall resign from membership in the said police force . . . .

STATEMENT OF THE CASE

This case involves one of many challenges by the Equal Employment Opportunity Commission to state and local laws setting mandatory retirement ages for law enforcement officers. Although the decisions are split, many courts have upheld the laws on the grounds that the high level of fitness and health necessary for law enforcement work makes age a bona fide occupational qualification.[1] In this case, the District Court similarly upheld a Pennsylvania law setting a mandatory retirement age of sixty. The Court of Appeals for the Third Circuit reversed.[2]

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[1] *See EEOC v. City of East Providence*, 798 F.2d 524 (1st Cir. 1986) (city police); *EEOC v. Missouri Highway Patrol*, 748 F.2d 447 (8th Cir. 1984), *cert. denied*, 474 U.S. 828 (1985); *EEOC v. New Jersey*, 631 F. Supp. 1506 (D.N.J. 1986), *sum. aff'd*, 815 F.2d 694 (3d Cir. 1987) (state troopers); *EEOC v. Tennessee Wildlife Resource Agency*, No. 81-3461 (M.D. Tenn. March 7, 1986) (wildlife officers), *appeal docketed*, No. 86-5539 (6th Cir.); *EEOC v. Kentucky State Police*, 43 FEP Cases 1045 (E.D.Ken. 1986), *appeal docketed*, No. 87-5193 (6th Cir.); *cf. EEOC v. Trabucco*, 791 F.2d 1 (1st Cir. 1986) (rejecting EEOC's attempt to relitigate bona fides of Massachusetts city's mandatory retirement age established in earlier suit by city).

But see EEOC v. Mississippi, 654 F. Supp. 1168 (S.D. Miss. 1987) (striking down mandatory retirement age for state troopers), *appeal docketed*, No. 87-4214 (5th Cir.); *EEOC v. Florida Highway Patrol*, 660 F. Supp. 1104 (N.D. Fla. 1986) (same for highway patrol); *EEOC v. City of Bowling Green*, 607 F. Supp. 524 (D. Ky. 1985) (same for city police).

The District Court had jurisdiction pursuant to 28 U.S.C. §1331 (1986) and 29 U.S.C. §634 (1986). The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291 (1986).

The District Court found that the job of state police officer required an officer to be capable of performing many specific, physically onerous tasks that were compiled from an extensive job analysis of the tasks officers actually performed. To perform these tasks, the Court found that the levels of

> "physical capacities necessary to perform the job of a State Police Officer include the aerobic capacity to run and pursue a suspect; the strength to disengage automobiles, to assist accident victims, or to drag incapacitated victims from dangerous situations; the coordination to handle firearms; the intact reflexes to operate automobiles at a highly demanding level of skill in all weather conditions; the visual, auditory and other sensory capabilities to be aware of circumstances in the environment; and freedom from disabling disease that would compromise an individual's ability to perform under stresses of long hours and taxing physiological circumstances." 645 F. Supp. 1548 (App. 17a)[3]

The District Court further found that all these fitness and health requirements declined significantly with age, and that these decreases cannot be totally offset significantly by training because of such factors as a decrease in trainable muscle and structural changes in the heart. 645 F. Supp. at 1550-51.[4] In particular, the Court found that

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[3] The job analysis suggested specific quantifications for strength and aerobic capacity (Court of Appeals Appendix at 1385-91), but the District Court made no findings whether these specific, numerical amounts were required.

[4] For example, the Court found that the decrease in aerobic capacity between an average group of men aged twenty-six and an average group of men age fifty-eight was 57%, that the most drastic decline in aerobic capacity occurs past the age of sixty, and that it was highly unlikely that a person would be able to offset that decrease through training. 645 F.

"substantially all" State Police Officers over the age of sixty have a high risk of developing cardiovascular disease that would make them liable to suffer attacks when placed under stress in emergency situations. 645 F. Supp. at 1554 (App. 32a).[5] The Court further found that testing for strength and endurance, and likelihood of heart disease was administratively and financially unfeasible, and that testing becomes riskier with age because of the increased risk of silent heart disease. 645 F. Supp. at 1555-56 (App. 34a). Indeed, because of that risk, older employees could only be tested for fitness after a full bank of laboratory studies and electrocardiograms, and only if "no signs of even mild hypertension or poor cardiac function" were present. *Id.* (App. 34a).[6] Furthermore, the cost constraints and administrative burdens would be compounded if a full testing program were to be applied to the nearly 4,000 members of the state police.

Accordingly, because many troopers over age sixty would lack physical qualifications for the job, in particular, the requisite levels of strength and endurance and a low risk of heart disease, and because the troopers could not

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Supp. at 1550-51 (App. 23a). The Court similarly found that relative strength declines by about 35% between the ages of twenty-nine and fifty, and that absolute muscular endurance declines by 30% between ages thirty and sixty. 645 F. Supp. at 1551 (App. 24a).

[5] The Court found in addition that at least 15% of all sixty year olds are likely to have hidden coronary problems, that this percentage is higher than for younger employees, and that police work, in general, leads to cardiovascular disease. 656 F. Supp. at 1551 (App. 23a, 25a).

[6] Although the District Court made no specific finding, even older employees who showed no such signs would face a considerable risk because the tests merely provide an estimate or probability of the disease existing and are of disputed predictive value for detecting coronary artery disease in patients without symptoms. (Court of Appeals Appendix 1732, 2315).

be tested on an individualized basis, the Court found age a BFOQ.

The Court of Appeals did not disagree with the District Court's underlying findings. It did not take issue with findings regarding the tasks required of officers, the physical qualifications required to perform those tasks, the likelihood that many troopers over age sixty would lack those qualifications, or the inability to test for the qualifications on an individualized basis. The Court held, however, that these findings alone did not justify the ultimate finding that age was a BFOQ essentially because the Commonwealth failed to demonstrate that it required all of its troopers under age sixty to meet these qualifications.

The Court expressed this rule against discriminatory enforcement of fitness qualifications in part in a highly general way: "Before a characteristic can be a reasonably necessary BFOQ, it must be a trait that the employer at least attempts to require of employees of all ages." Slip op. at 9 (App. 9a). The Court's dispositive holding, however, was both more specific and more onerous to employers: "Until minimum standards are developed, implemented and enforced, the PSP [Pennsylvania State Police] cannot justify its mandatory retirement law by relying on good health and physical conditions as BFOQ's reasonably necessary to PSP business." Slip op. at 8. (App. 8a) The Court acknowledged that this latter rule conflicted with decisions of other circuits that refused to consider a failure to enforce minimum fitness standards against younger troopers as a sine qua non of a BFOQ. Slip op. at 8-9 (*citing EEOC v. Missouri State Highway Patrol*, 748 F.2d 447 (8th Cir. 1984), *cert. denied*, 474 U.S. 828 (1985); *EEOC v. City of East Providence*, 798 F.2d 524 (1st Cir. 1986)) (App. 8a, 9a).

Because the Commonwealth had not demonstrated that it enforced specific minimum standards against all its officers under age sixty, the Court rejected the Commonwealth's BFOQ defense and remanded for a determination of relief.

REASONS FOR GRANTING THE WRIT

A. In *Western Airlines v. Criswell*, 472 U.S. 400 (1985), this Court adopted the two-prong test set forth in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), for determining the existence of a BFOQ in an age discrimination case. To establish a BFOQ, the employer must prove: (1) the existence of a job qualification reasonably necessary to the normal operation of its business, and (2) that age serves as a proper proxy for that qualification. To justify age as a proxy, the employer must prove either that all or substantially all individuals within the excluded group lack the qualification, or that some members of the excluded group lack the qualification and that it is impossible or impractical to determine which members possess the qualification on an individual basis. Prong two is not at issue in this case.

In adjudicating prong one, courts concentrate substantially on whether objective evidence demonstrates that a certain level of health or fitness is reasonably necessary to the normal operation of the employer's business. In this case, there was an abundance of such evidence, and neither the parties nor the Court of Appeals disputed it on appeal. The question raised by the Third Circuit's decision in this case is the extent to which an employer must introduce evidence to demonstrate not only that qualifications are "reasonably necessary" on an objective basis but also that they are "reasonably necessary" on a subjective basis as demonstrated by the employer's efforts to assure that younger employees possess the qualifications at issue.

The Commonwealth does not dispute that a trait can only justify a mandatory retirement age if it is a trait that

an "employer at least attempts to require of employees of all ages." Some evidence of such efforts is necessary to assure that the employer does not discriminatorily apply higher standards to older employees than to younger.

The District Court's findings, however, indicate a significant commitment to these qualifications, and the Court of Appeals did not truly reverse the District Court on this standard.[7] The difficult questions raised by the Third Circuit's opinion are what the commitment must involve and what evidence of this commitment an employer must present in its case in chief to justify a finding of a job qualification that is otherwise justified by objective evidence as a reasonably necessary qualification of the job. This Court has never addressed this question.

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[7] In this case, the Commonwealth deduced the physical qualifications from a list of tasks actually performed by state troopers. 645 F. Supp. at 1548, 1549 (App. 16a, 19a). (testimony "confirms that troopers . . . are required to, and do, perform the tasks"). That younger employees perform these tasks indicates that they are capable of doing so. Furthermore, troopers are required by regulation to report to their supervisors "any medical or physical deficiency that may affect their performance," and supervisors may order physical examinations for any officer if they believe that the officer's ability to perform an assigned task is in any way impaired. *Id.* at 1549-50 (App. 20a). Although these monitoring efforts are decentralized, decentralized efforts obviously may be effective in ways that centralized efforts are not. Supervisors are on the scene and can make the crucial initial evaluation of the ability to perform assigned tasks. (Testimony of Chief of Staff, Court of Appeals, Appendix at 3086) In addition, the State Police have a regularized program to monitor weight and other medical deficiencies, and assigns to "limited duty status" those officers who are "unable to perform the full range of duties required of a trooper" because they are "temporarily disabled." 645 F. Supp. at 1550 (App. 20a, 21a). There was also evidence that, prior to initiation of suit, the department had begun an expensive, long-term program to evaluate fitness standards and to provide a training regimen to assure fitness levels more comprehensively. 645 F. Supp. at 1549 (App. 19a, 20a). These findings by the District Court belie any claim that the Commonwealth does not at least attempt to require the physical capabilities necessary for the job of state trooper in all employees.

The Third Circuit's answer was that an employer must have specific "minimum standards" that it must "implement," presumably through regular testing, and that it must "enforce," presumably through sanctions and eventual dismissal of nonqualifying employees. This extreme standard embraces a rule of absolute necessity rather than reasonable necessity. In promulgating this rule, the Third Circuit embraced a theory pushed nationally by the EEOC in litigation of this kind but rejected by every other circuit.

For example, in *EEOC v. City of East Providence*, 798 F.2d 524 (1st Cir. 1986), the Court rejected the EEOC's contention that the BFOQ defense was precluded by the defendant's failure to show that it periodically tests all police officers below age sixty to determine whether they meet specific physical qualifications:

> "We believe such a position would be extreme. The ADEA was intended to be used as a shield to protect older employees from discriminatory employment practices, not as a sword to compel employers concerned with public safety to perfect their procedures for assuring the maximum physical fitness of younger employees.
>
> * * *
>
> To be sure, a city's acceptance of low physical standards, coupled with other factors, might persuade a district court that physical fitness was not deemed a necessary job qualification by that police force. . . . But a police force's failure continuously to monitor physical standards does not, standing alone, compel a finding that physical fitness is not a reasonably necessary job qualification." *Id.* at 529-30.

The Court reasoned in addition:

> "Defendants' failure strictly to monitor physical standards among younger officers is not necessarily inconsistent with its recognizing that certain levels of strength, aerobic capacity, coronorary fitness, etc., are necessary for effective police work. Even when physical standards are not enforced, defendants may believe that most of the younger officers will meet the necessary minimums, whereas most of the over-60 officers will not. While imposition of uniform standards would be necessary should the city wish to weed out the occasional unfit young officer, the city may feel that a more relaxed policy will nonetheless suffice to achieve its goal of maintaining a reasonably adequate force most of whose officers possess the requisite physical capabilities." *Id.* at 529 n. 4.

In *EEOC v. Missouri Highway Patrol*, 748 F.2d 447 (8th Cir. 1984), *cert. denied*, 474 U.S. 828 (1985), the Court similarly not only rejected the EEOC's and Third Circuit's position, but actually criticized the District Court for focusing on the Highway Patrol's failure to implement a regular program of physical fitness testing and training. The Court noted that tests presented "problems of patient preparation, physician interpretation and duplication of field demands." *Id.* at 453. "Testing also presents problems of arbitrariness in determining what particular result is a 'passing' one which determines that the Patrol member can do the job." *Id.* Most importantly, the emphasis on testing ignored "the inadequacy of physician examinations and testing as methods of distinguishing between qualified and unqualified individuals over the age of sixty." *Id.* at 454.

The Court similarly questioned "the relevance of a physical fitness program":

> "The District Court's digression into this subject reflects concern with the subjective motivations for the Patrol's policies. The *Tamiami test*, however, focuses on objective evidence, particularly objective medical evidence, in support of the BFOQ. The test also does not evaluate the age restrictions in terms of the ideal employee. It simply requires objective evidence on whether the older employees can perform their duties or on whether there is a practical way to differentiate among employees other than age." *Id.* at 454.

In *EEOC v. University of Texas Health Science Center*, 710 F.2d 1091 (5th Cir. 1983), the Court considered and rejected yet another variation of the EEOC's theme. In that case, the University of Texas justified an age limit on the hiring of new campus police on the ground that this age limit guaranteed the requisite combined levels of physical capability and experience in all officers. The EEOC claimed that the employer's action in raising the hiring ceiling from forty-one to forty-five because of difficulties filling posts belied the employer's claim that its age ceiling was necessary. The Court rejected this argument, however, because "it incorrectly suggests that the ability of individuals to perform effectively can never be balanced against the need to fill vacancies." *Id.* at 1096. The Court recognized that an employer need not require all employees to meet its desired minimum level in order to base a BFOQ on fitness requirements.

Even in *Heiar v. Crawford County Wisconsin*, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985), relied on by the Third Circuit in this case, slip op. at 8 (App. 8a), the Court did not make evidence of periodic

physical exams necessary for proof of a BFOQ but treated the employer's failure to conduct exams as only a "telling bit of evidence." That evidence supported the District Court's finding that mandatory retirement at age fifty-five was not reasonably necessary. The evidence was particularly significant because, unlike in this case, the District Court had rejected the claim that the employer could not practically test for the qualifications on an individualized basis.

As these cases indicate, the Third Circuit rule requiring implementation and enforcement of minimum standards is improper for at least two reasons. First, the rule fails to recognize the significance of the impracticality of testing. Where testing of over-age employees is impractical, an employer not only cannot test whether these employees fail to meet the desired standard but also cannot evaluate the extent of their deviation from it. Thus, where the evidence demonstrates a significantly greater likelihood that over-age employees will lack "reasonably necessary" qualifications than younger employees, and there is a corresponding probability that their deficiencies will be larger in scope, the employer does not discriminate against over-age employees by requiring them at some point to retire even if the employer permits some deviation from the desired fitness standards for under-age employees. Some deviation for over-age employees could also be permitted if their fitness level could practically be evaluated. But in the absence of such an evaluation method, the risk is too great. Furthermore, the reality is that an employer permits some deviation for most older employees by retaining them in the years immediately preceding the retirement age. Only when the risk of a substantial deviation becomes too great must the employee retire.

The Third Circuit and the EEOC in essence oversimplify by treating qualifications as if they could simply be had or not had. But in the real world, qualifications are not so simple. For example, the task and fitness analysis in this case indicated, inter alia, that an officer must possess the aerobic capacity to pursue a suspect, and the strength to disengage automobiles, or to drag incapacitated victims from automobiles and other dangerous situations. The analysis put informed, but somewhat arbitrary numbers to these tasks. But not all suspects are of the same speed and not all automobiles and victims are of the same weight or in the same position. Furthermore, some officers may be very capable of some of these tasks but less capable of others. And sheer physical ability is not the only qualification; the Commonwealth does believe that some deviation from physical standards may be compensated by experience or by other talents. All these factors counsel against enforcement of specific, crude minimum qualifications and counsel in favor of other, more tailored and tolerant efforts to assure fitness.

Unfortunately, over-age officers differ from the younger in that, as the District Court found on the basis of documented evidence, they are likely to be significantly less capable in virtually the full range of physical skills reasonably necessary for the job. Furthermore, again as the District Court found, over-age officers, unlike younger officers, can only improve with training so far. And notwithstanding the benefits of experience, at some point in the physical deterioration of aging, experience can no longer compensate for a lack of physical capabilities. In the absence of a practical method for evaluating over-age employees, a mandatory retirement age is necessary. Such a requirement does not discriminate against over-age employees merely because the employer does not enforce

specific, minimum standards against those below retirement age.

A requirement for implementation and enforcement of minimum standards makes even less sense where, as here, the evidence demonstrates not only that testing older people is impractical but also that testing younger people is impractical. The District Court found that "[t]he cost to test an officer's strength, skill, agility and visual acuity, and to perform blood tests, and stress, or cardiovascular tests, would be in the area of $600 per person tested," 645 F. Supp. at 1551,[8] or approximately $2,400,000 for the approximately four thousand members of the force. The Court found that this cost made testing even of only the older employees "highly impractical." *Id.* at 1556. (In addition, employees approaching sixty have much of the increased risk of coronary heart disease that makes testing of over-sixty employees dangerous.[9]) Despite these difficulties, the Commonwealth is developing a system to upgrade the monitoring and training of officers in the areas of strength and endurance, *id.* at 1549-50 (App. 18a-21a), but the mere fact that it has not yet devised a practical system should not be held against it.

The second reason for rejecting the Third Circuit approach is that it could lead actually to harsher treatment of some older employees and to unfair treatment of many cat-

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[8] This was the basic cost per person. "If any abnormality were detected during the medical screening, the cost would sky-rocket, as more advanced tests would be needed." 645 F. Supp. at 1555 (App. 34a).

[9] For example, when the Commonwealth prescreened officers for a fitness analysis in its program to develop an improved monitoring and training program, most of those screened out because of cardiovascular problems were in the 50-59 age group. (Court of Appeals Appendix at 2431).

egories of employees under retirement age. For example, many employees approaching the mandatory retirement age of sixty may also lack some of the physical qualifications "reasonably necessary" to be a state police officer. Unable to test practically for these qualifications, the Commonwealth would be required by the Third Circuit approach to set a mandatory retirement age well below sixty to assure that no or virtually no officers remained on the force who are not fully qualified. Moreover, even if the Commonwealth could develop some crude testing techniques for employees below the retirement age who therefore have a lower risk of heart disease, the Third Circuit approach would require the Commonwealth to sanction, assumedly fire, all non-qualifying employees regardless of their other merits. Thus, even with testing, many officers approaching age sixty would be forcibly retired.

The Third Circuit approach similarly threatens onerous consequences for the handicapped or disabled. In *EEOC v. New Jersey*, 631 F. Supp. 1506 (D.N.J. 1986), *sum. aff'd*, 815 F.2d 694 (3d Cir. 1987), for example, the EEOC challenged the assertion that health and fitness were "reasonably necessary" job qualifications by pointing to fifty-nine members of the force with "temporary or permanent disabilities." *Id.* at 1509. The District Court rejected this argument on the ground that New Jersey had begun to rid itself of these employees. "This tragic consequence," however, prompted the Court "to note that it comes with some ill grace for the EEOC in the course of raising the rights of one group to suggest that others should be precipitously discharged." *Id.*

In Pennsylvania, supervisors now attempt to fit disabled troopers into desk jobs and place them on "limited duty" status to preclude their involvement in physical en-

forcement actions. In few cases do these disabilities continue for extended periods of time. The Third Circuit approach would prohibit these indulgences. The ADEA should not require such harsh results.

A more appropriate rule would continue to place primary emphasis on the objective evidence that certain physical qualifications are reasonably necessary to the normal operation of the business. If the employer made this showing, the employer would provide sufficient evidence to justify the finding of a reasonably necessary job qualification if it introduced some evidence of its commitment to these qualifications. The Plaintiff could, of course, counter this presentation not only with countervailing objective evidence that the job does not require physical capabilities but also with evidence that the employer's actual practice belies its claim of reasonable necessity. The Plaintiff could present evidence indicating that younger employees do not generally possess or approach the physical qualities claimed to be "reasonably necessary," or that the employer's course of conduct indicates that the employer lacks a commitment to these qualifications, or that the difference between the physical capabilities of the actual older and younger employees are not significant. The trier of fact should evaluate any such evidence carefully. In some cases, the Plaintiff's evidence may even be sufficiently clear to make a finding of a BFOQ clearly erroneous. The implementation and enforcement of minimum standards against younger employees, however, should not, in and of itself, be necessary for proof of a BFOQ.[10]

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[10] If an employer does not enforce a specific, minimum standard, the employer should demonstrate in prong two, in proving that it must rely on age as a proxy, not only that it cannot practically test for the qualification but also that older employees are significantly more likely to lack the desired qualifications than employees under retirement age.

B. This Court should grant the writ of certiorari first because the Third Circuit's decision in this case brings clearly into the open a new and important question for this Court: In addition to the objective evidence showing that a physical trait is a "reasonably necessary" qualification for a job, what evidence must an employer provide of its commitment to that qualification for employees below the retirement age? The answer to this question is not easy. But the Third Circuit's acceptance of the EEOC approach creates a firm conflict with every other Circuit to consider this question.

This Court should also grant certiorari because this conflict between the circuits involves an issue of exceptional importance to all employers, both public and private, who have established or will establish age as bona fide occupational qualifications. Cases challenging age BFOQs have involved as varied occupations as police officers, firefighters, game wardens, airline pilots, bus drivers, campus security personnel and wildlife resource officers. In maintaining or establishing these BFOQs, employers are entitled to know whether, or in what manner, they must implement and enforce specific minimum standards against younger employees. In addition, parties litigating BFOQs are entitled to a clear understanding of the evidentiary burdens required of them. Confusion may cause unjust results. Resolving this issue would help assure litigation focused directly on the relevant issues.

Ultimate resolution of the issue in this case is also necessary to assure the proper disposition of this and other cases. The Third Circuit holding is inconsistent with the notion that individualized testing may not be feasible, and is not necessary to prevent discriminatory treatment. Because of this erroneous holding, the Pennsylvania State

Police faces potential damages of $4,000,000 in back-pay and benefits for those forced to retire. At least one other case within the Third Circuit presents comparable issues and is subject to the rule established in this case. *EEOC v. City of Pittsburgh*, No. 83-2712 (W.D.Pa.) (challenging mandatory retirement age for city policemen). In addition, several other ongoing cases involving law enforcement officers present similar issues regarding the necessity for implementation and enforcement of minimum standards. *See EEOC v. Tennessee Wildlife Resources Agency*, No. 86-5539 (6th Cir.); *EEOC v. Kentucky State Police*, No. 87-5193 (6th Cir.); *EEOC v. Mississippi, Department of Wildlife Conservation*, No. 87-4214 (5th Cir.); *EEOC v. Vermont Dep't of Public Safety*, Nos. 83-460, 84-241 & 85-166 (D.Vt.); *EEOC v. New York*, No. 83-CIV-8984 (M.D.N.Y.). Whether the Third Circuit is right or wrong, the conflict presents a probability that at least some of these cases will be wrongly decided.[11]

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[11] In October, 1986, Congress enacted the Age Discrimination Employment Amendments of 1986, P.L. No. 99-592, §3(a), 100 Stat. 3342, which permit state and local governments to discharge firefighters or law enforcement officers pursuant to "bona fide" retirement plans for a seven-year period, during which Congress has undertaken to study the matter. 29 U.S.C.A. §623(i) (West Supp. 1987). This provision, however, became effective on January 1, 1987 and does not apply to causes of action arising under the ADEA before that date. 29 U.S.C.A. §623, note (West Supp. 1987). In the suits referenced in text, state agencies face millions of dollars of liability for cases arising before that date. The law also does not apply to private employers or to retirement plans established after March 3, 1983. P.L. 99-592, §3(b). (In addition, the EEOC has taken the position in this case that officers retired before January 1, 1987 are entitled not just to pay until that date but actually to reinstatement.)

Consideration of the issues in this case by this Court would not prejudge the results of Congress's study of the general issue of mandatory retirement plans for law enforcement and firefighting personnel. In studying the needs of law enforcement on a national basis, Congress necessarily must focus on the objectively necessary qualifications for that

Finally, this Court should grant certiorari because of the onerous consequences of the Third Circuit rule on younger employees who would be adversely affected by attempts to implement and enforce crude minimum standards.

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occupation. The objective necessity of those qualifications was not at issue before the Court of Appeals and would not be at issue in this Court. The only issue for this Court is an issue that will probably survive any changes that Congress might make in the law, namely, whether an employer is precluded from relying on objectively necessary qualifications because of a failure to enforce those qualifications in a particular way against employees under the retirement age. That issue is generic to all BFOQ litigation and does not turn on the specific facts of law enforcement.

Furthermore, because the Pennsylvania State Police and other law enforcement agencies cannot be confident that Congress will effect any change in the law, the Third Circuit opinion requires them to take steps to assure that their retirement laws will not be subject to challenge after 1993. These steps will require them to take the harsh approach toward younger employees mandated by the Third Circuit rule.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-5807 & 86-5902

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AND LIEUTENANT OTTO J. BINKER
v.
COMMONWEALTH OF PENNSYLVANIA;
PENNSYLVANIA STATE POLICE; AND
DANIEL F. DUNN, COMMISSIONER OF
THE PENNSYLVANIA STATE POLICE
Lieutenant Otto J. Binker and
Equal Employment Opportunity Commission,
Appellants

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA (SCRANTON)
(D.C. Civ. No. 83-0321)

Argued: June 18, 1987
Before: SEITZ, MANSMANN, *Circuit Judges*,
and BISSELL, *District Judge*.*
(Filed: September 21, 1987)

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* The Honorable John W. Bissell of the United States District Court for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

SEITZ, *Circuit Judge*.

Lieutenant Otto J. Binker and the Equal Employment Opportunity Commission (EEOC) appeal from the final order of the district court denying their motion for a permanent injunction. This court has jurisdiction under 28 U.S.C. §1291 (1982).

I.

Pennsylvania law requires all state police officers to retire at age sixty. 71 P.S. §65(d) (Purdon Supp. 1987). Lieutenant Binker filed this action to prevent his immi-

nent retirement from the Pennsylvania State Police (PSP) pursuant to the mandatory retirement law. Binker claimed that the law violated the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. (1982) (ADEA),[1] and the equal protection clause of the United States Constitution. U.S. Const. amend. XIV. Shortly thereafter, the EEOC brought an action seeking injunctive relief and backpay for all persons adversely affected by the law. The actions were consolidated in May 1983.

In their defense, the Commonwealth and the PSP argued that the age limitation was a lawful bona fide occupational qualification (BFOQ).

In October 1984, the district court entered final judgment in favor of defendants. *EEOC v. Pennsylvania*, 596 F. Supp. 1333 (M.D. Pa. 1984). The district court determined

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[1] In October 1986, Congress enacted the Age Discrimination in Employment Amendments of 1986, P.L. No. 99-592, 100 Stat. 3342, which, *inter alia*, provide as follows:

> It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—
>
> (1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and
>
> (2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of [the ADEA].

29 U.S.C.A. §623(i) (West Supp. 1987). This provision became effective on January 1, 1987, and does not apply to causes of action arising under the ADEA before that date. 29 U.S.C.A. §623 note (West Supp. 1987). Because Binker filed this action in 1983, the provision is inapplicable here. We also note that the provision is self-repealing and will cease to be effective on December 31, 1993. *Id.*

that "the PSP is a paramilitary organization where the mandatory retirement age is reasonably necessary to the operation of a safe and efficient law enforcement organization." *Id.* at 1343. Further, the court found that substantially all PSP officers over age 60 cannot safely and efficiently perform the necessary physical duties of the job and that it would be impractical to determine which officers could perform the job of PSP trooper.

Binker and the EEOC appealed the decision. Prior to oral argument, the Supreme Court decided *Johnson v. City of Baltimore*, 105 S.Ct. 2717 (1985), and *Western Air Lines v. Criswell*, 105 S.Ct. 2743 (1985). *Criswell*, in particular, explained the parameters of the BFOQ defense and adopted the standard developed by the Fifth Circuit in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976). Because it appeared that the district court had assumed that good health and physical fitness are reasonably necessary job qualifications, we remanded this action for reconsideration and additional particularized factual findings in light of the Supreme Court's then recent pronouncements. *EEOC v. Pennsylvania*, 768 F.2d 514 (3d Cir. 1985).

On remand, the district court allowed the parties to present additional testimony and evidence. The district court again ruled in favor of defendants. *EEOC v. Pennsylvania*, 645 F. Supp. 1545 (M.D. Pa. 1986). It found that good health, physical fitness, strength, and dexterity are reasonably necessary to the essence of PSP business. The court determined that eleven physical dimensions are required to perform the job of state police officer: eye-hand coordination, manual dexterity, finger dexterity, reaction time, absolute strength, relative strength, absolute power, relative power, aerobic endurance, anaerobic-aerobic en-

durance, and absolute muscular endurance. The district court further found that there is a dramatic age-related effect on these capacities, and that there must be extensive and expensive medical screening for hidden coronary problems in officers over 60 before they can be tested for these capacities.

The district court held, therefore, that age was a legitmate proxy for the BFOQs of good health, physical strength, endurance and dexterity because substantially all officers over age 60 have a moderately high or higher risk of developing cardiovascular disease, the absence of which is a reasonably necessary BFOQ. In the alternative, the district court held that it would be impossible or impractical to treat officers over 60 on an individualized basis because they must pass initial screening before being tested for certain physical capacities and officers should not be physically tested if they have even mild hypertension or poor cardiac function, conditions that are common in people over 60. In any event, the court found that the cost of screening and testing officers in the highest age category would be prohibitive. This appeal followed.

II.

Appellants contend that the district court erred in finding that good health, physical fitness, strength and dexterity are bona fide occupational qualifications reasonably necessary to the essence of PSP business. We review factual findings under the clearly erroneous standard.[2]

Section 4(a)(1) of the Age Discrimination in Employment Act makes it unlawful for a covered employer "to fail or refuse to hire or to discharge any individual or other-

[2] Our treatment of this issue makes it unnecessary to address appellants' other challenges.

wise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. §623(a)(1) (1982). A state or a political subdivision or agency thereof is a covered employer under ADEA. 29 U.S.C. §630(b) (1982). The proscription against age-based employment discrimination protects individuals between the ages of 40 and 70. 29 U.S.C. §631(a) (1982).

The statute, however, recognizes an exception when the age classification serves "as a necessary proxy for neutral employment qualifications essential to the employer's business." *Western Air Lines v. Criswell*, 105 S.Ct. 2743, 2750 (1985). The statute thus tolerates otherwise unlawful age discrimination "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. §623(f)(1) (1982). The BFOQ defense " '[is] in fact meant to be an extemely narrow exception to the general prohibition' of age discrimination." *Criswell, supra*, 105 S.Ct. at 2751, quoting *Dothard v. Richardson*, 431 U.S. 321, 334 (1977).

In *Criswell*, the Supreme Court adopted a two-prong test for determining whether an employer has established the BFOQ defense. First, the employer must demonstrate that the qualification used to justify the age requirement is reasonably necessary to the essence of its business. *Criswell, supra*, 105 S.Ct. at 2751. Second, the employer must show that it is compelled to rely on age as a proxy for this qualification by establishing either that all or substantially all adults over a particular age lack the qualification or that it is impossible or impractical to deal with the older employees on an individualized basis. *Id.*

While the ADEA does not require perfect monitoring and maintenance of a particular qualification at all age levels, it does bar selective age-based enforcement of

health and fitness requirements. *Cf. Trans World Airlines inc. v. Thurston*, 105 S.Ct. 613, 621 (1985) (if airline grants some disqualified captains the privilege of bumping less senior flight engineers, it may not deny this opportunity to others because of their age). The PSP admitted that it presently has no mandatory minimum fitness standards and that its new maintenance program is only "evolving" towards such standards.

As to the first prong of the BFOQ defense, the district court found that good health, physical fitness, strength, and dexterity are qualifications reasonably necessary to the essence of PSP business, namely, safety. The court did not, however, indicate what minimum level of these traits is necessary to the performance of state police trooper duties.

The district court found that in 1982 the PSP began to develop a health and physical fitness training program for its members. The research phase is complete and the program is now in the developmental phase. The district court further found:

> In the future, the department will undertake quarterly assessments of the physical fitness of its members, will write exercise prescriptions for each member, and will provide education in stress management, nutrition and weight control. *Eventually, mandatory fitness standards will be implemented.*

EEOC v. Pennsylvania, supra, 645 F. Supp. at 1549 (emphasis added).

The district court found that, prior to the new program, PSP monitored health and fitness on a limited basis. An officer was required to report physical or medical deficiencies that might affect his or her performance. The PSP

could then require complete medical diagnosis and prognosis or a physical examination. Since 1974, each PSP member has been required to undergo semi-annual monitoring of weight and other medical deficiencies and submit proposed treatment programs for problems other than weight.

The district court's findings primarily concern the *health* of PSP officers, not their fitness levels. The factual findings supporting the district court's treatment of the first prong of the BFOQ defense do not include the determination that the department in fact presently requires all state troopers to maintain a minimum level of health and fitness. Nor would the record support such a finding. This factual deficiency convinces us that the district court committed clear error in concluding that the PSP had demonstrated a bona fide occupational qualification reasonably necessary to its business. *See Heiar v. Crawford County, Wisconsin*, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985) (determination that mandatory retirement is not reasonably necessary to essence of sheriff's department's business supported by absence of fitness monitoring). *But see EEOC v. Missouri State Highway Patrol*, 748 F.2d 447 (8th Cir. 1984), *cert. denied*, 106 S.Ct. 88 (1985) (physical fitness program of questionable relevance to BFOQ defense). Until minimum standards are developed, implemented and enforced, the PSP cannot justify its mandatory retirement law by relying on good health and physical conditioning as BFOQs reasonably necessary to PSP business.

In *EEOC v. New Jersey*, 631 F. Supp. 1506 (D.N.J. 1986), *aff'd*, 815 F.2d 694 (3d Cir. 1987), New Jersey's age 55 mandatory retirement law for state police officers was upheld against an ADEA challenge. That district court,

however, specifically found that all members of the New Jersey State Police are subject to mandatory fitness requirements and are sanctioned for noncompliance. In the case at bar, the PSP does not presently require all officers to meet minimum fitness standards; rather such standards will only be implemented "eventually" *supra*. *EEOC v. New Jersey* is, therefore, distinguishable from the present case in this critical respect.

In holding that the district court committed clear error in finding that good health, physical fitness, strength, and dexterity are BFOQs reasonably necessary to the essence of PSP business, we reject the analysis in *EEOC v. City of East Providence*, 798 F.2d 524 (1st Cir. 1986). The *East Providence* court wrote:

> The ADEA was intended to be used as a shield to protect older employees from discriminatory employment practices, not as a sword to compel employers concerned with public safety to perfect their procedures for assuring maximum physical fitness of younger employees.

Id. at 529. The court stated that in establishing a mandatory retirement law to achieve its fitness goal, the city could rely on its belief that most younger officers will meet the necessary minimums. *Id*. at 529, note 4.

We disagree. We believe this is precisely the kind of employment discrimination that Congress sought to eliminate by enacting the ADEA. Before a characteristic can be a reasonably necessary BFOQ, it must be a trait that the employer at least attempts to require of employees of all ages. In any event, the district court did not find that most younger officers possess the purported BFOQs. And, in fact, the record suggests the contrary.

III.

Accordingly, we will vacate the judgment of the district court and remand for proceedings not inconsistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO. 83-0321

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND LIEUTENANT OTTO J. BINKER,
Plaintiffs

vs.

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA STATE POLICE, and the COMMISSIONER OF THE PENNSYLVANIA STATE POLICE,
Defendants

MEMORANDUM

On July 19, 1985, the Court of Appeals for the Third Circuit remanded the above action to this court for reconsideration of the record and additional particularized fact-finding. The parties have supplemented the record at additional hearings in September, 1985 and April, 1986, and the case is now ripe for our decision.

As the parties well know, Pennsylvania law currently provides that any member of the Pennsylvania State Police, regardless of rank, who reaches the age of sixty, must resign from the force, unless at that age he has attained less than twenty years of service. 71 P.S. §65(d). Plaintiffs in this case attack the validity of this law under The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§621-634. Plaintiff Binker also attacks this act as a denial of equal protection and due process. The Common-

wealth defends, asserting that the mandatory retirement age is a bona fide occupational qualification (BFOQ) reasonably necessary to the operation of the Pennsylvania State Police. 29 U.S.C. §623(f)(1).

I. PRIOR HISTORY

In our first decision of this case, *Equal Employment Opportunity Commission v. Commonwealth of Pennsylvania*, 596 F. Supp. 1333 (M.D. Pa. 1984), we held that the mandatory retirement age of sixty is a bona fide occupational qualification. In reaching our decision, we held that the defendants, in order to establish their BFOQ defense, were required to prove (1) the existence of a job qualification reasonably necessary to the essence of the State Police business, *and* (2) that they have reasonable cause for believing *either* (a) that all or substantially all individuals within the excluded group are unable to perform their duties safely and efficiently, *or* (b) that it is impossible or impractical to determine the disqualifying trait on an individual basis. *Id.* at 1337-1338; 1343.

We also held that, although the majority of State Police officers, once they reach age sixty, hold ranks higher than Trooper, the relevant occupation for evaluation of the BFOQ defense is that of Trooper. This holding was based on the fact that all officers, even though they may have varying ranks and assignments, are essentially equal members of a paramilitary organization:

> They are all compelled to carry a gun and to take appropriate police action twenty-four hours a day, every day of the year. While officers may be assigned a particular position, they do not have a right to retain that position and are subject to transfer. Any officer can be called out at any time to perform emergency duties,

such as to handle a prison outbreak or a riot. Even if an officer is assigned a desk position, if an emergency situation arises at the station (e.g., an attempted prisoner escape during fingerprinting), that officer is expected to be able to handle that situation appropriately.

Id. at 1343.

On appeal, the Third Circuit affirmed both of these holdings, but concluded that we had not made sufficiently particularized factual findings supporting our conclusion that good health and physical fitness and strength are job qualifications reasonably necessary to the essence of the State Police business (the first prong of the BFOQ test). *Equal Employment Opportunity Commission v. Commonwealth of Pennsylvania*, 768 F.2d 514, 518 (3d Cir. 1985). In ordering a remand, the court suggested that we further elaborate our findings with respect to both prongs of the BFOQ test, *id.* at 518, fn. 3, but it made clear that the legal standard we had applied and the occupation we had assessed in our initial ruling on the case were the proper ones:

Given the undisputed evidence of the traditional police dutes incumbent upon all PSP officers, we believe that the district court was correct in finding that PSP is a paramilitary organization as defined by the First Circuit in *Mahoney*. We believe, moreover, that the *Mahoney* formulation is correct for defining "occupations" in paramilitary police organizations where all relevant personnel are required to be ready for emergency action, regardless of rank and general duties. We hold, therefore, that the district court ap-

plied the proper legal standard in determining whether the age limitation is a BFOQ.

Id. at 517.[1]

Our task now is to review the record, including the supplementary evidence adduced at the September and April hearings, to determine if the State Police have in fact met their burden of proving a BFOQ under the standard outlined in our original decision as affirmed by the Third Circuit. We accordingly make the following findings of fact.

II. FINDINGS OF FACT

A. Pennsylvania State Police department is a paramilitary organization.

1. All officers are authorized and responsible for taking necessary police action while "off duty." Officers are also strongly encouraged to carry their issued revolver or a qualified personal revolver when off duty. All officers are subject to being called to duty for emergencies. (Defendants' exhibits 1 and 2).

2. While "off duty" or emergency action is not undertaken frequently, such situations do arise and must be

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[1] The Third Circuit also vacated our prior order denying the petition to intervene of a younger group of officers and remanded the petition to this court for reconsideration. None of the original petitioners expressed any desire to participate in the hearing on remand. Nevertheless, on September 24, 1986, we issued an order directing any applicants for intervention who still desired to intervene to file renewed applications for intervention on or before October 6, 1986. No applications were filed, and we therefore deem any former applications to be withdrawn. We will not further address these applications.

addressed by any member regardless of rank. (N.T. 3:75 (6/13/83); 6:81-83 (6/13/83); 7:57 (11/7/83); 7:74 (11/7/83)).[2]

Officers of higher ranks than Trooper are called upon to perform the tasks of a Trooper in the normal course of their work, including performing such physical tasks as assisting stranded motorists in snow storms, pushing disabled vehicles off the roadway, chasing suspects on foot, chasing suspects by vehicle at speeds of seventy to eighty miles per hour, subduing suspects, and removing victims of accidents from wrecked vehicles. (N.T. 6:45 (6/13/83); 6:93-94 (6/13/83); 6:110-112 (6/13/83); 7:56 (11/7/83); 7:66-71 (11/7/83)).

B. Good health and physical fitness, strength, and dexterity are job qualifications reasonably necessary to the essence of the State Police business.

1. The industrial psychologist, David J. Wagner, expert witness for the State Police, performed a job analysis for the State Police in which he identified 554 tasks performed by a Trooper. (Defendants' exhibit 12).

2. Mr. Wagner arrived at this list of 554 tasks by conducting a series of in-depth interviews with state police officers to find out what they did in their jobs. (N.T. 6:15 (6/13/83)).

3. The preliminary list of tasks culled from the interviews was verified and modified through a series of questionnaires completed by three to four hundred state police troopers. (N.T. 6:15 (6/13/83)).

4. Each of these 554 tasks finally identified can be broken down into components to determine the skills,

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[2] The notation "N.T. 3:75 (6/13/83)" means Notes of Testimony from the hearing that commenced on June 13, 1983, volume 3, page 75.

knowledge, abilities, and personal characteristics necessary to perform the tasks. (Defendants' exhibit 12).

5. Analysis of the tasks and the skills, abilities, knowledge, and personal characteristics required to perform these tasks reveals that there are eleven physical abilities or dimensions which are necessary for the adequate performance of the job of a State Trooper. (Defendants' exhibit 14 at 44-63).

6. These eleven physical dimensions required to perform the job of a State Police Officer are as follows:

a. Eye-hand Coordination—the ability to make precise movements of the hands when vision is used.

b. Manual Dexterity—speed of skilled arm-hand movements of relatively large objects.

c. Finger Dexterity—the ability to manipulate small objects which primarily involves the use of the fingers.

d. Reaction Time—the speed with which an individual is able to respond to a stimulus.

e. Absolute Strength—strength in moving a heavy object other than body weight or applying force to an immovable object (e.g., pushing car; subduing, restraining, apprehending; lifting; dragging; breaking up fight).

f. Relative Strength—strength in moving body weight, or strength per pound of body weight (e.g., climbing).

g. Absolute Power—strength or force in moving an external weight quickly and explosively (e.g., breaking down door, breaking through window; restraining).

h. Relative Power—strength or force in moving body weight quickly and explosively (e.g., chasing, dodging obstacles).

i. Aerobic Endurance—endurance in moving large muscle groups repeatedly for three minutes or more but preferably over five minutes (e.g., chasing for longer distances, walking, searching).

j. Anaerobic-Aerobic Endurance—endurance in moving large muscle groups repeatedly for at least one minute but not for more than two minutes (e.g., chasing for shorter distances; pushing car; apprehending; carrying, dragging).

k. Absolute Muscular Endurance—endurance in repeatedly lifting an external weight, or sustaining it by an isometric contraction (e.g., apprehending; breaking up fights; lifting). (Defendants' exhibit 14 at 44-63).

7. Put more simply, the physical capacities necessary to perform the job of a State Police Officer include the aerobic capacity to run and pursue a suspect; the strength to disengage automobiles, to assist accident victims; or to drag incapacitated victims from dangerous situations; the coordination to handle firearms; the intact reflexes to operate automobiles at a highly demanding level of skill in all weather conditions; the visual, auditory and other sensory capabilities to be aware of circumstances in the environment; and freedom from disabling disease that would compromise an individual's "ability to perform under stresses of long hours and taxing physiological circumstances." (N.T. 2:3-4 (6/13/83)).

8. Approximately 137 of the 554 tasks identified by defendants' expert require one or more of the following psychomotor capabilities or dimensions in order to be performed adequately:

—eye-hand coordination
—manual dexterity

—finger dexterity
—reaction time

(Defendants' exhibit 14 at 46-48).

9. Among those tasks which depend to a high degree on the above psychomotor dimensions for adequate performance are:

—checking victims of accidents for injury and administering first aid
—pursuing, overtaking, and stopping another motorist at high speeds
—skillfully and accurately handling firearms
—subduing and restraining a suspect or a participant in a fight
—investigating crimes and collecting evidence
—skillful operation of patrol car at all speeds and in all weather conditions

(Defendants' exhibits 12 and 14).

10. Approximately forty-four of the 554 tasks require one or more of the following physical performance dimensions in order to be performed adequately:

—absolute strength
—relative strength
—absolute power
—relative power
—aerobic endurance
—anaerobic-aerobic endurance
—absolute muscular endurance

(Defendants' exhibit 14 at 50).

11. Among those tasks which depend on the above physical dimensions for adequate performance are:

—pushing a car off the road
—subduing, restraining, apprehending suspects

—lifting, dragging, carrying persons, animals, inanimate objects
—breaking up fights
—climbing over obstacles in the course of a chase or climbing onto large vehicles in the course of inspecting them
—breaking down doors and smashing windows
—chasing suspects fleeing on foot
—walking or searching for suspects or missing persons

(Defendants' exhibits 12 and 14).

12. Testimony elicited from several active state police officers, and from expert Wagner, confirms that troopers and, indeed, their superiors, are required to, and do, perform the tasks summarized in paragraphs 7 and 9, above. (N.T. 6:45, 52 (6/13/83); 6:81-83 (6/13/83); 6:93-94 (6/13/83); 6:110-112 (6/13/83); 7:56-57 (11/7/83); 7:66-71 (11/7/83); 7:74 (11/7/83)).

13. The purpose of the State Police business is to protect the livelihood, property, and well-being of citizens of the Commonwealth of Pennsylvania. (N.T. 1:22 (11/7/83)); the essence of the business is, therefore, safety.

14. The Pennsylvania State Police began in 1982 to develop a health and physical fitness training program for its members. (Defendants' Exhibit 52; N.T. 2:102 (11/7/83); 1:71 (4/7/86)).

15. The purpose of this program is to enhance the general fitness of the membership of the Pennsylvania State Police Force. When fully in place, it will have two parts, one the medical health assessment of the individual and the other a training program designed to assure that officers can perform the tasks of a state police officer demanding physical strength, agility, and dexterity. (N.T. 2:33 (11/7/83); 1:25 (4/7/86)).

16. As of the date of the April, 1986 hearing, the research phase of the program had been completed, and the developmental phase had been entered. State Police officers have all completed "Medical Screening and Personal History Assessment" forms designed to aid in the development of a detailed physical profile of each member of the State Police force. Fitness coordinators, officers selected from each troop who are in charge of conducting fitness assessments, have been selected and trained. A $40,000 contract for blood testing of all officers has been let and the testing has been completed. Approximately $60,000 worth of health and fitness testing equipment has been purchased. (Defendants' exhibits 53-56; N.T. 1:74-78, 81 (4/1/86)).

17. In the future, the department will undertake quarterly assessments of the physical fitness of its members, will write exercise prescriptions for each member, and will provide education in stress management, nutrition and weight control. Eventually, mandatory fitness standards will be implemented. (N.T. 1:78-84 (4/7/86)).

18. Prior to the institution of this newest fitness program, the state police did pursue limited monitoring of the health and fitness of the members. Troopers were and are required to report to their supervisors any medical or physical deficiency that may affect their performance. In certain circumstances, officers are required to provide their superiors with a complete diagnosis and prognosis of their condition from the treating physician. Troop commanders and Bureau or Division directors may order physical examinations for an officer if they feel that an officer's ability to perform an assigned task is in any way impaired. (N.T. 1:11-16 (4/7/86); Defendants' exhibits 43, 48).

19. Beginning in 1974, the State Police began monitoring the weight and other medical deficiencies of all members of the force on a semi-annual basis. In the last year, monitoring has been performed on a quarterly basis. All data is reported in the semi-annual or, now, quarterly, Medical Deficiency Status Report. Members who have a medical deficiency other than being overweight are required to submit to their commanding officer a program of proposed treatment as prescribed by their family physician. (N.T. 1:16-17 (4/7/86); EEOC exhibit 8).

20. The State Police maintains a limited duty status program for those officers who are unable to perform the full range of duties required of a trooper. Generally, this program is for officers who are temporarily disabled and who will be rehabilitated and returned to work. Any officer on limited duty status must submit to the State Police quarterly medical reports indicating their diagnosis, prognosis, and length of time their status is expected to continue. At any given time, less than two percent of the State Police membership is assigned to limited duty status. (N.T. 1:18-20, 43-44 (4/7/86); Defendants' exhibit 51).

21. Performance of the duties of a state police officer in a manner that does not endanger the public, and that does guard the well-being and safety of the citizens of Pennsylvania requires that police officers be in good health, be physically strong, and have agility, dexterity, and stamina.

C. The Pennsylvania State Police are compelled to rely on the mandatory retirement of officers at age 60 as a proxy for individual testing of older officers for the presence of the good health, physical fitness, strength and dexterity required to perform the job of a state police officer.

1. As an individual's age increases, his ability to perform physical functions decreases. (N.T. 2:11-12 (6/13/83); 5:54-56 (11/7/83)).

2. Exercise and training can slow the decline in physical capabilities to some extent. (N.T. 2:147-148 (6/13/83)).

3. The decrease in psychomotor functions and capability (eye-hand coordination, manual dexterity, finger dexterity, reaction time) is sharper after 60 than after 50. (N.T. 2:147-149 (6/13/83)).

4. Between ages 25 and 60, eye-hand coordination, manual and finger dexterity decrease by about 15%. (N.T. 7:41 (6/13/83)).

5. Between ages 20 and 60, response time or movement time (the time required to complete the appropriate response once it is initiated) decreases by about 21%, while reaction time (the time required to initiate action) decreases by about 43% (N.T. 7:41-42 (6/13/83)).

6. Exercise and training slows the decline in the neuromuscular and coordinative area to a lesser extent than in other physical performance areas. (N.T. 2:147-148 (6/13/83)).

7. Aerobic capacity decreases as a person's age increases. By age 60, an individual experiences as much as a 35-40% decrease in aerobic capacity from age 20. (N.T. 2:149-161 (6/13/83); 5:54-56 (11/7/83); 6:32 (11/7/83)).

8. The average decrease in aerobic capacity between a group of men whose average age was 26 and another group whose average age was 58 was 57%. The average aerobic capacity for 26 year olds, in milliliters per kilogram

of body weight per minute was 42.07, while the average for the 58 year olds was 23.8 (N.T. 7:60-62 (6/13/83).

9. The most drastic decline in aerobic capacity occurs past the age of 60. (N.T. 7:64 (6/13/83)).

10. Although training can increase aerobic capacity, aerobic capacity is a function of cardiac output or stroke volume. It is unlikely that training can significantly increase stroke volume in older people because of the structural changes in the heart that occurs with aging. (N.T. 7:66-67 (6/13/83)).

11. The effect of an age-related decrease in aerobic capacity is to cause the older person to fatigue much sooner than a younger person, and to cause the older person to recover much more slowly from aerobic exertion. (N.T. 7:67-68 (6/13/83)).

12. It is more likely that individuals over sixty years of age would have hidden coronary problems than younger people. (N.T. 2:188 (6/13/83)).

13. At least 15 percent of all 60 year olds in the general population are likely to have hidden coronary problems (N.T. 2:188 (6/13/83)).

14. Between ages 20 and 60 a person also experiences a decline in absolute strength. This decline can be offset somewhat by training, but the older a person is, the less offset there would be, because there is a decrease in trainable muscle as the body ages. (N.T. 7:46-47 (6/13/83)).

15. Between ages 29 and 50, there is a decline in relative strength of about 35%. The decline continues past the age of 60. (N.T. 7:48-51 (6/13/83)).

16. Between ages 30 and 60, there is a 30% loss in absolute muscular endurance. (N.T. 7:53, 55 (6/13/83)).

17. Decrease in relative strength and muscular endurance cannot be totally offset by training because of the decrease in lean muscle tissue as the body ages. (N.T. 7:54 (6/13/83)).

18. Between ages 29 and 50 there is a 20% decline in relative power. The decline continues beyond age 60. (N.T. 7:56 (6/13/83)).

19. There is also an age-related effect on anaerobic/aerobic capacity. In short bouts of high level activity, such as a timed rescue drag, a 60 year old cannot move as quickly or as repeatedly as a younger person. (N.T. 7:69-70 (6/13/83)).

20. It is highly unlikely that a person would be able to offset the decrease in anaerobic capacity that occurs with age. (N.T. 7:70 (6/13/83)).

21. Many of the physical tasks of a police officer require more than one of the physical capacities identified above. Where this is the case, the effect of a decrease in more than one of the supporting capacities would be at least additive, and perhaps greater than additive on performance. (N.T. 7:73 (6/13/83)).

22. When there is an average decrease of a certain percent of capacity with age in any of the above dimensions, one can expect that 67% of the population falls within plus or minus one standard deviation of that average percent. The standard deviation for these figures, according to defendants' expert, is plus or minus 10%. For an average decrease of 30%, therefore, 67% of the population will fall somewhere between a decrease of 20% and 40%. (N.T. 7:76 (6/13/83)).

23. Substantially all officers between ages 56 to 60 on the Pennsylvania State Police force have at least a moderately high risk of developing cardiovascular disease within the next ten years. When defendants' expert Wagner performed the risk analysis for cardiovascular disease recommended by plaintiffs' expert Mostardi, out of 99 officers sampled in the 56 to 60 age group, nearly 86% had a moderately high or higher risk of developing cardiovascular disease. (Defendants' exhibits 32 and 38; N.T. 6:112-115 (11/7/83); 7:103 (11/7/83)).

24. Police work, in general, leads to cardiovascular disease. (Defendants' exhibits 32 and 65).

25. An officer with hidden coronary problems is likely to manifest those problems in stress situations where he must exert a good deal of physical force. (N.T. 2:190 (6/13/83)).

26. The cost to test an officer's strength, skill, agility and visual acuity, and to perform blood tests, and stress, or cardiovascular tests, would be in the area of $600.00 per person tested. (N.T. 2:198 (6/13/83); 7:91 (6/13/83)).

27. The typical test for determining strength is the one repetition maximum method. In this test, strength is determined by the amount of weight an individual can lift one time and one time only. This test, however could be costly and dangerous, because the individual is asked to exert maximum force. Exerting maximum force results in a dramatic increase in blood pressure. Therefore, screening for hypertension and poor cardiac function must be performed before administering the test. Anyone who has even mild hypertension or poor cardiac function should not take the one repetition maximum test. (N.T. 7:79-80 (6/13/83)).

28. The older a person becomes, the more dangerous it is to administer physical fitness tests to that person, because of the increased risk of silent heart disease as the person grows older. (N.T. 7:90 (6/13/83)).

29. Screening for poor cardiac function prior to administering a fitness test involves a physical examination, laboratory studies, resting electrocardiograms, and exercise electrocardiograms by a cardiologist. (N.T. 7:90 (6/13/83)).

30. After a thorough medical screening, a 60 year old could be given a strength test such as the one repetition maximum test, but it should be given in the presence of a physician. (N.T. 7:106 (6/13/83)).

31. In order to accurately reflect the current physical condition of a person over 60 and his ability to perform the job of a police officer, he should be screened and tested at least annually. (N.T. 7:106 (6/13/83)).

32. The test battery given to members of the State Police in September and October of 1983 cannot be used to prove the proposition that substantially all officers nearing the age of retirement cannot perform the job of a state police officer.

33. Although the officers were told to do their best on the test battery, they were also told not to over-exert themselves and to proceed at their own pace. (N.T. 1:22-23 (11/7/83); 2:70-71 (11/7/83)).

34. The officers were told that no pre-established standards existed and that there was no such thing as "passing" or "failing" the tests. (Binker exhibits 10 and 12; N.T. 2:81-82 (11/7/83)).

35. After the test was administered, the Commonwealth did apply passing and failing standards, including time limitations.

36. If the officers participating in the test had known that there were standards and time limitations that would be applied, and if they had known that the results were to be used in this mandatory retirement litigation, they would have put forth a greater effort to do better and to achieve the "passing" scores. (N.T. 4:60-61 (11/7/83)).

37. Because of the cautionary disincentives to performance at full capacity, and because of the questionable practice of not informing the officers of the existence of pass-fail standards, the results of the test battery themselves are questionable and cannot be used to prove the validity of the age 60 mandatory retirement provisions.

III. DISCUSSION

A. Qualifications Reasonably Necessary to the Essence of the State Police Business.

The first prong of the test for a bona fide occupational qualification as enunciated in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), and as adopted by the Supreme Court in *Western Airlines v. Criswell*, U.S. , 86 L.Ed. 2d 321 (1985), requires that the employer prove the existence of a job qualification "reasonably necessary to the essence of [its] business." *Criswell*, U.S. at , 86 L.Ed. 2d at 333. We hold that the Commonwealth in this case has met its burden of proof.

From the findings of fact detailed above at II-B, it should be obvious that the job of State Police Trooper can be very strenuous. The sole purpose of the State Police is to protect the safety and well being of the citizens of the

Commonwealth. The essence of the State Police business is, therefore, safety. Safe and effective performance of some of the most critical tasks of a state police officer requires that the officer be physically strong and agile, and that he be in good health and unlikely to collapse under physical or emotional stress. Some of these most critical tasks include the safe and effective handling of firearms, pursuit and capture by automobile or on foot of criminal suspects, and prompt assistance of accident victims. Undisputed testimony by the Commonwealth's experts, and testimony by State Police officers themselves, establishes that these critical tasks demand high degrees of strength, agility, endurance and coordination.[3]

The plaintiffs in this case have argued that, although some tasks do require high levels of strength, agility, endurance, and coordination, these tasks are not performed frequently, or even by all officers, and that they should not, therefore, set the physical performance standard for all officers. We find this argument to be of no importance to our inquiry. Tasks demanding high levels of physical performance may not be performed frequently, but the ability to perform these tasks is what renders the Pennsylvania

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[3] The specific tasks that require high levels of physical performance and psychomotor capacity are outlined in the testimony of and a study performed by David J. Wagner, the Commonwealth's industrial psychologist. Further analysis of these tasks is provided by Dr. Albert Paolone, and Dr. Richard A. Berger, exercise physiologists who worked with Mr. Wagner in performing the study. The EEOC strongly criticized Wagner's study, arguing that it was developed under a consent decree from a case involving the hiring and promotion of minorities and not involving age. We find that study to be thorough and valid to the extent it made a detailed analysis of the tasks performed by each rank of police officers, and find that the nature of a state police officer's job does not change when it is being scrutinized in an age discrimination case rather than a race discrimination case.

State Police effective in protecting the safety of the citizens of this Commonwealth. Without the ability of all officers to meet the occasional, unexpected need for accuracy in handling firearms; for speed, strength, endurance, and agility in pursuing and subduing criminal suspects; and for strength, skill, and speed in rescuing accident victims, the safety of the public would be needlessly endangered. We therefore hold that good health, physical fitness, strength, and dexterity are job qualifications reasonably necessary to the essence and safety of the State Police business.

The plaintiffs in this case argue against this holding on the ground that the Pennsylvania State Police organization makes no attempt to monitor the health and physical fitness of its younger members and permits some to remain on the job with serious disabilities. The absence of a physical fitness or monitoring program within an organization is certainly evidence that physical fitness is not a reasonably necessary job qualification, *see Heiar v. Crawford County*, 746 F.2d 1190, 1198 (7th Cir. 1984), but that is all it is—evidence. *See also, Equal Employment Opportunity Commission v. City of East Providence*, 798 F.2d 524, 530 (1st Cir. 1986), ("a police force's failure continuously to monitor physical standards does not, standing alone, compel a finding that physical fitness is not a reasonably necessary job qualification").

In the case before us, the State Police have, and have had since at least 1974, some form of health and physical fitness monitoring. Although it is true that periodic physical fitness testing has not been a part of this program in the past, the State Police have made regular weight and medical deficiency checks of the membership, and have required diagnosis and treatment by physicians for those members with conditions that threaten their ability to perform the job. Members who are unable to perform the full

duties of a trooper because of a medical deficiency are placed on a temporary limited duty status. These officers must seek treatment for their problems and are required to submit to their superiors quarterly medical reports indicating their diagnosis, prognosis, and course of treatment. More recently, the State Police have begun an expanded health and physical fitness training program that involves quarterly physical fitness assessments and mandatory fitness standards.

These health and fitness programs, while fairly limited at the time this action was instituted in 1983, indicate that the Commonwealth and the State Police organization are concerned about the physical abilities of the State Police officers to do their jobs. Far from proving that health and fitness are not reasonably necessary to the essence of the State Police business, they demonstrate the increasing awareness of the importance of these qualifications to the effective accomplishment of the goals and purpose of the Pennsylvania State Police and the increasing commitment of the State Police to maintaining the good health and fitness of its members.

It is conceded that a few of the younger members on the force do suffer from serious physical disabilities, but the existence of these few members suffering from such disabilities does not outweigh the evidence from the experts' job analysis and the testimony of troopers themselves that good health, physical strength, endurance, and dexterity are necessary to effectively protect the public's safety and well being. This is especially true where the State Police are already implementing a program of regular physical assessments and mandatory fitness standards.[4]

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[4] The EEOC urges us to completely ignore all recent and prospective efforts of the Pennsylvania State Police to monitor and improve the

In light of all the evidence, therefore, we conclude that good health, physical strength, endurance, and dexterity are job qualifications reasonably necessary to the essence of the State Police business.

B. Necessity of Age as a Proxy for Individual Evaluation.

The second prong of the BFOQ test requires the employer to prove that it is "compelled to rely on age as a proxy for the safety-related job qualifications validated in the first inquiry." *Criswell,* U.S. at , 86 L.Ed.2d at 333. This second prong may be satisfied either by a showing that the employer has "reasonable cause, that is, a factual basis, for believing that all or substantially all persons [above the mandatory retirement age] would be unable to perform safely and efficiently the duties of the job involved," *id.,* U.S. at , 86 L.Ed.2d at 333-34, *or* by a showing that it is " 'impossible or impractical' to make individualized determinations of the capabilities of persons in the excluded group." *E.E.O.C. v. Commonwealth of*

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physical capabilities of the members of the force on the grounds that we should be focusing only on the conditions and programs as they existed before this suit was filed. We decline to ignore evidence of recent efforts, however, because we find them to be relevant to the question of whether physical fitness is and was a reasonably necessary job qualification. It must be noted that the job of a State Police officer does not appear to have changed or become more demanding since institution of this suit or the institution of a more comprehensive physical assessment program. The institution of the newer programs, therefore, is indicative of the physical demands of the job as it has been all along. We note too that other courts have considered this type of evidence in evaluating the BFOQ claims of other State Police forces. *See, e.g., Equal Employment Opportunity Commission v. State of New Jersey,* 631 F. Supp. 1506, 1508-1509 (D. N.J. 1986) (the recent implementation of a Well Trooper Program and mandatory physical fitness standards are evidence that the health and fitness of New Jersey State Police Officers is essential to the safe and efficient performance of their law enforcement duties).

Pennsylvania, 768 F.2d at 517, *quoting, Criswell,* U.S. at , 86 L.Ed.2d at 334.

In this case, we find that the Commonwealth has met its burden of proving that it is compelled to rely on age as a proxy for individual determinations. In the first place, we believe that the Commonwealth has conclusively proved that substantially all (86%) of the State Police Officers, once they near or reach the age of 60, have a moderately high risk or higher of developing cardiovascular disease. Absence of cardiovascular disease is a reasonably necessary job qualification because an officer with hidden coronary problems is most likely to manifest those problems in stress situations. We have already noted that the purpose of the State Police organization is to protect the safety and well-being of the citizens of Pennsylvania. The ability of an older officer to serve this purpose is greatly reduced when there is a high probability that he has a cardiovascular disease. The State Police cannot afford to retain officers who are likely to suffer attacks when placed under stress in an emergency situation.

Additionally, plaintiffs' own expert, Dr. Mostardi, in his report of a project he undertook for the Akron, Ohio police department, recommends against employing anyone with a moderately high or higher risk of cardiovascular disease. This high risk of developing cardiovascular disease, along with the decrease of an officer's capacities in the various physical and psychomotor dimensions as he approaches and passes age 60, leads us to conclude that all or substantially all officers over the age of 60 would be unable to perform safely and efficiently the duties of a State Police Officer.

Even if the fact that 86% of officers nearing the age of 60 have a high risk of developing cardiovascular disease

were insufficient to demonstrate that the State Police appropriately rely on age as a proxy for individual evaluation, this fact, along with others, supports our alternative holding that it is highly impractical, if not impossible, to make individualized determinations of the capabilities of 60 year old police officers.

Expert testimony given by both plaintiffs' and defendants' experts demonstrates that as a person grows older, his ability to perform physical and psychomotor functions decreases, while the chance that he will develop disabling cardiovascular problems increases (*see* findings of fact, above). Although these facts, by themselves, may be insufficient to justify age as a BFOQ, they do justify questioning the ability of older officers to perform the critical tasks of a state police officer. Unfortunately, individual testing of older police officers is highly impractical and nearly impossible.

The typical test for determining body strength, one of the job qualifications validated in III-A above, is the one Repetition Maximum method. In this test, strength is determined by the amount of weight an individual can lift one time and one time only. This test is performed using different lifting apparatus and different muscle groups to determine the strength of various parts of the body. The test, however, is dangerous to administer to older officers who have a high probability of having or developing cardiovascular problems, because the individual is asked to exert maximum force. Exerting maximum force results in a dramatic increase in blood pressure. Screening for hypertension and poor cardiac function must be performed before administering this test, and anyone who has even mild hypertension or poor cardiac function *cannot* be tested.

Screening for poor cardiac function prior to administering a fitness test involves a physical examination

by a physician, laboratory studies, resting electrocardiograms, and exercise electrocardiograms by a cardiologist. Only after this type of thorough medical screening could a 60 year old who shows *no* signs of even mild hypertension or poor cardiac function be given a strength test such as the one repetition maximum test, and then only in the presence of a physician.

In order to accurately reflect the physical condition of a person over 60, and his ability to perform the job of a State Police Officer, medical screening and physical testing should be performed at least annually. The older the individual becomes, the riskier it is to administer the test because of the increased risk of silent heart disease, and the danger that physical performance testing will precipitate an attack. Further, the cost of performing annual medical screening and physical testing is prohibitive. For each officer, the cost to test strength, skill, agility, and visual acuity, and to perform blood tests and stress, or cardiovascular tests would be in the area of $600.00. If any abnormality were detected during the medical screening, the cost would sky-rocket, as more advanced tests would be needed.

In sum, even if a 60 year old could be tested for the qualifications of physical strength and endurance, i.e., even if he passed the stringent medical screening, the cost of the test on an annual basis renders testing individuals above the age of 60 for their ability to perform the duties of a state police officer highly impractical. Further, while we recognize that many tests can be done to discover many physical capabilities and diseases, we do not believe testing is practical or economically feasible in the present case. We agree with defendants' expert, Dr. Paolone, that testing cannot safely measure all dimensions in everyone. An-

nual testing would place an unreasonable administrative *and* financial burden upon the Pennsylvania State Police force. We therefore hold that mandatory retirement at age 60 is a necessary proxy for the safety-related job qualifications of good health, strength, endurance, agility, and dexterity.

IV. CONCLUSIONS OF LAW

We conclude that the Commonwealth of Pennsylvania and the Pennsylvania State Police have met their burden of proof that the mandatory retirement age of sixty for Pennsylvania State Police Officers is a bona fide occupational qualification. Accordingly, the mandatory retirement statute, 71 P.S. §65(d), is valid and is not in violation of the federal Age Discrimination in Employment Act.[5]

s/ R. DIXON HERMAN
United States District Judge

Dated: Oct. 22nd 1986

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[5] We also reiterate our prior holding that the compulsory retirement statute does not violate the Equal Protection and Due Process clauses of the Constitution.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO. 83-0321

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and LIEUTENANT OTTO J. BINKER,

Plaintiffs

vs.

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA STATE POLICE, and the COMMISSIONER OF THE PENNSYLVANIA STATE POLICE,

Defendants

ORDER

AND NOW, this 22nd day of October, 1986, in accordance with the accompanying Memorandum, IT IS HEREBY ORDERED and declared that:

1. The Pennsylvania mandatory retirement statute for State Police officers, 71 P.S. §65(d) is not in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§621-634; nor does the statute violate the Due Process or Equal Protection Clauses of the United States Constitution.

2. Plaintiffs' motion for a permanent injunction against Defendants to restrain the involuntary retirement of Pennsylvania State Police officers who reach the age of sixty is denied.

s/ R. DIXON HERMAN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-5807 & 86-5902

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND LIEUTENANT OTTO J. BINKER

v.

COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA STATE POLICE; AND DANIEL F. DUNN, COMMISSIONER OF THE PENNSYLVANIA STATE POLICE

Lieutenant Otto J. Binker and Equal Employment Opportunity Commission,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (SCRANTON)
(D. C. Civ. No. 83-0321)

Present: SEITZ and MANSMANN, *Circuit Judges* and BISSELL, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel June 18, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 22, 1986, be, and the same is hereby vacated and the cause remanded to the said District Court for further proceedings not inconsistent with the opinion of this court.

ATTEST:
s/ Sally Mvros
Clerk

September 21, 1987

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* Hon. John W. Bissell, U. S. District Judge for the District of New Jersey, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5807
No. 86-5902

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AND LIEUTENANT OTTO J. BINKER
v.
COMMONWEALTH OF PENNSYLVANIA, et al.

Lieutenant Otto J. Binker and
Equal Employment Opportunity Commission,

Appellants

(Civil Action No. 83-0321—M.D.Pa.—Scranton)

SUR PETITION FOR REHEARING

PRESENT: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, *Circuit Judge*, and BISSELL,* *Circuit Judge*.

The petition for rehearing filed by appellees in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Becker and Judge Greenberg would grant the petition for rehearing in banc.

BY THE COURT:
s/ Seitz
Circuit Judge

DATED: OCT 19 1987

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* The Honorable John W. Bissell of the United States District Court for the District of New Jersey, sitting by designation.

Supreme Court, U.S.
FILED
JAN 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-958

In the Supreme Court of the United States

December Term, 1987

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA STATE POLICE and the COMMISSIONER OF THE PENNSYLVANIA STATE POLICE,

Petitioners

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and LIEUTENANT OTTO J. BINKER,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals establish a novel rule in age discrimination cases in holding that the Pennsylvania State Police (PSP) had not established a bona fide occupational qualification of good health and physical fitness when the PSP had not developed, implemented or enforced any minimum standards of health or fitness?

2. Is a District Court's finding of good health, physical fitness, strength and dexterity as BFOQ's, clearly erroneous when the finding is based upon the general truism that physical capabilities decrease with age, and no findings were made to establish what minimal levels of these traits are reasonably necessary to the essence of state police work, and the uncontradicted evidence of record establishes that state troopers are not required to maintain any minimum levels of fitness as a qualification for keeping their jobs?

TABLE OF CONTENTS

	PAGE
Counter-Statement of Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Statutory Provisions Involved	1
Counter-Statement of the Case	2
Reasons for Denying the Writ	6
1. The Third Circuit's Holding does not Establish a Novel Rule in Mandatory Retirement Cases under the ADEA	6
(a) The Third Circuit's Decision Does Not Require Mandatory Testing of All Employees to Establish a BFOQ	6
(b) The Third Circuit's Opinion is in Accord with the ADEA Which Requires That Cases Be Decided on an Individual Basis	8
2. The Decision by the Third Circuit does not Conflict with Decisions of Other Courts ...	9
3. The Third Circuit's Conclusion that the District Court Committed Clear Error in Finding that the PSP Demonstrated a BFOQ should not be the Basis for Granting Certiorari	10
(a) The PSP has Failed to Establish Why the District Court's Finding of a BFOQ Should be Reviewed	10
(b) The Circuit Court Correctly Concluded That the District Court Erred in Finding that the PSP Demonstrated a BFOQ ...	11
(c) The Circuit Court Opinion does not Require that Certiorari be Granted to	

Review the Entire BFOQ Defense 13
Conclusion 14

TABLE OF AUTHORITIES

CASES: PAGE
EEOC v. City of East Providence, 798 F.2d 524 (1st Cir. 1986) 9, 10
EEOC v. Commonwealth of Pennsylvania, Nos. 86-5807 and 86-5902 (3rd Cir. Sept. 21, 1987) 5, 7, 12
EEOC v. Commonwealth of Pennsylvania, 768 F.2d 514 (3rd Cir. 1985) 3
EEOC v. Commonwealth of Pennsylvania, 645 F. Supp. 1545 (M.D. Pa. 1986) 3
EEOC v. Commonwealth of Pennsylvania, 596 F. Supp. 1333 (M.D. Pa. 1984), *vacated and remanded*, 768 F.2d 514 (3rd Cir. 1985) 2, 4
EEOC v. Missouri State Highway Patrol, 748 F.2d 447 (8th Cir. 1984), *cert. denied*, 106 S. Ct. 888 (1985) 9
EEOC v. State of New Jersey, 620 F. Supp. 977 (D. C. N.J. 1985) 12, 13
EEOC v. University of Texas Health Science Center, 710 F.2d 1091 (5th Cir. 1983) 9
Heiar v. Crawford County, Wisconsin, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985) 8, 9
Johnson v. Mayor and City of Baltimore, 105 S. Ct. 2717 (1985) 3, 7, 12
Stone v. Western Air Lines, Inc., 544 F. Supp. 33 (C.D. Calif. 1982) 7

Trans World Airlines, Inc. v. Thurston, 105 S. Ct. 613 (1985) 7

Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) 3

Western Airlines, Inc. v. Criswell, 105 S. Ct. 2743 (1985) 3, 5, 7, 8, 11, 12

STATUTES:

Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et. seq.* 2

29 U.S.C. 621 (b) 7

29 U.S.C. 623 (a) (1)..... 11

29 U.S.C. 623 (f) (1) 12

OTHER AUTHORITIES

Supreme Court Rule 21.1 (j) 11

Supreme Court Rule 21.3 11

Supreme Court Rule 21.5 11

STATUTORY PROVISIONS INVOLVED

The Respondent agrees with the PSP's references to applicable statutory provisions with the exception of the citation to: The Age Discrimination Employment Amendments of 1986, P.L. No. 99-592, §3(a), (b), 100 Stat. 3342 (codified at 29 U.S.C.A. §623(i) and note (West Supp. 1987).

These provisions become effective on January 1, 1987, and do not apply to any cause of action arising under the Age Discrimination in Employment Act of 1967 as in effect before January 1, 1987. *See* The Age Discrimination Employment Amendments of 1986, P.L. No. 99-592, 7, 100 Stat. 3344 (codified at 29 U.S.C.A. §623 note (West Supp. 1987). *See* PSP petition at p. 21 n. 11.

COUNTER-STATEMENT OF THE CASE

The Petition presented by the Pennsylvania State Police (PSP) asks this Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit which held that Pennsylvania's mandatory retirement of state police officers at age 60 violated the provisions of the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, (ADEA). Specifically, the Third Circuit held that since the PSP was attempting to retire 60 year olds based upon job fitness qualifications which it did not impose upon younger members of the force, the district court had committed clear error in finding that the PSP demonstrated a bona fide occupational qualification (BFOQ) justifying retirement of 60 year olds.

Lieutenant Otto J. Binker initiated this action on March 11, 1983 challenging his forced retirement from the PSP on his 60th birthday as, *inter alia*, a violation of the ADEA[1]. Although preliminary injunctive relief was granted by the District Court, Binker's request for a permanent injunction was denied on October 24, 1984, in *EEOC v. Commonwealth of Pennsylvania*, 596 F. Supp. 1333 (M.D. Pa. 1984). A timely appeal was filed with the Third Circuit and the District Court granted an injunction pending appeal. While on appeal, this Court

[1] On May 9, 1983, the EEOC initiated a similar action against the PSP which was subsequently consolidated with the Binker action by the U.S. District Court for the Middle District of Pennsylvania.

announced its decisions in *Johnson v. Mayor and City Council of Baltimore*, 105 S. Ct. 2717 (1985) and *Western Airlines, Inc. v. Criswell*, 105 S. Ct. 2743 (1985), clarifying when age-related employment criteria are valid under the ADEA and adopting the two-pronged BFOQ test articulated in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976). The Third Circuit accordingly vacated the District Court order and remanded for aditional particularized fact finding in accord with *Johnson* and *Criswell*. *EEOC v. Commonwealth of Pennsylvania*, 768 F.2d 514 (3rd Cir. 1985). The District Court had *assumed* that good health and physical strength were job qualifications reasonably necessary to the essence of the PSP business without making any particularized fact finding to that effect. The Court of Appeals stated at that time that it found this omission particularly troubling in light of the allegation that the PSP made no attempt to monitor the health and/or the physical prowess of younger officers and permitted some to remain with serious disabilities. *Id.*

On September 20, 1985 the District Court dissolved all injunctions and Lieutenant Binker was mandatorily and involuntarily retired on October 16, 1985. After additional remand hearings, the District Court once again entered an opinion and order finding that good health, physical fitness, and strength and dexterity were qualifications reasonably necessary to the job of state police trooper, and accordingly upheld the mandatory retirement of officers at age 60. *EEOC v. Commonwealth of Pennsylvania*, 645 F. Supp. 1545 (M.D. Pa. 1986) (App. lla-36a).[2] In its decision the Court made numerous

[2] All references to "App. _____a" refer to the appendix annexed to the PSP Petition for a Writ of Certiorari.

findings regarding the tasks and skills performed and required of state troopers, *id*, at 1547-1549 (App. 15a-19a), and numerous other findings regarding health, which support the general proposition that as age increases ability to perform physical functions decreases. *Id.* at pgs. 1550-1552. (App. 22a-24a). The District Court, however, made no findings on what *minimum level* of good health and physical fitness were reasonably necessary to the job performance of a state police officer.[3]

Significantly, the District Court also found that as of 1982 the PSP had only begun to develop a health and fitness program for its members, that as of April 1986 only the research phase of the program had been completed and development started, that in the *future* the PSP will perform quarterly assessments of the physical fitness of its members, and that *eventually mandatory fitness standards will be implemented. Id.* at 1549. (App. 19a-20a). Additionally, while the District Court made findings that the PSP does pursue some limited monitoring of health and maintains limited duty status for those who cannot perform the full range of trooper duties, *id.* at 1549-1550, (App. 20a-21a), the District Court could not point to any evidence which showed that the PSP ever disciplined an officer for a poor physical condition or that any minimum fitness standards were required of any trooper.

[3] It is noteworthy that in October 1983, the PSP in defense of this action, tested officers of all ages under a test battery designed to determine if cadets could satisfy *minimum* physical requirements of a PSP trooper. The results of its testing revealed that not a single officer over 40 was capable of doing his job. The District Court did not find the test to be credible. *EEOC v. Commonwealth of Pennsylvania*, 596 F. Supp. at 346-347.

On appeal, the Third Circuit held that the District Court committed clear error in finding that the PSP demonstrated a bona fide occupational qualification justifying mandatory retirement at age 60. *EEOC v. Commonwealth of Pennsylvania*, Nos. 86-5807 and 86-5902. (3rd Cir. Sept. 21, 1987) (App. 1a-10a). The Court ruled that the District Court could not satisfy the first prong of the *Criswell* BFOQ test in that it did not determine what minimum level of fitness was reasonably necessary to the job of state police trooper. While the District Court made findings on the general tendency of health to decline with age, it did not define the level which was reasonably necessary to the job of state trooper. More importantly, however, the Third Circuit held that the PSP could not establish a bona fide job qualification based upon health and physical conditioning when the PSP admitted no mandatory minimum fitness standards existed and that such standards would only be implemented sometime in the future. In light of the ADEA's prohibition against selective age-based enforcement of health and fitness requirements, the Court of Appeals concluded that before the PSP could attempt to justify good health and fitness as BFOQ's, they must at least attempt to require these traits of all employees and not just those that it wishes to retire. It is from this holding that the PSP requests that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit.

REASONS FOR DENYING THE WRIT

1. THE THIRD CIRCUIT'S HOLDING DOES NOT ESTABLISH A NOVEL RULE IN MANDATORY RETIREMENT CASES UNDER THE ADEA

a. The Third Circuit Decision Does Not Require Mandatory Testing Of All Employees to Establish a BFOQ.

The principal reason and first question advanced by the PSP for the granting of a writ of certiorari is that the Third Circuit has somehow established a new rule in age-discrimination cases which not only requires employers to show that a particular job qualification is reasonably necessary to the essence of its business, but now also requires that an employer demonstrate that each individual employee possesses the job qualification. The PSP, however, has misapprehended the basis of the Circuit Court's opinion.

Through some contrivance of its own, the PSP has equated the Third Circuit's statement that "[u]ntil minimum standards are developed, implemented and enforced, the PSP cannot justify its mandatory retirement law by relying on good health and physical conditioning as BFOQ's reasonably necessary to PSP business," to mandate that it must conduct individual testing of all officers and sanction and/or dismiss all those that fall below the job qualification in order to establish good health and physical conditioning as a BFOQ. PSP petition at p. 12. The PSP has overreacted to what was a plain and straightforward application of the ADEA by the Circuit Court to the uncontradicted facts of this case.

The Third Circuit was not establishing a new BFOQ test outside that established by this Court in *Criswell* and *Johnson, supra*, but rather was in essence stating that the PSP could not justify retiring 60 year olds for not possessing exemplary physical health and fitness when the PSP made no attempt to require troopers to meet minimum fitness requirements, and, indeed, no fitness standards even existed. Thus, the Third Circuit was compelled to conclude that retiring 60 year olds under the pretext of lack of physical fitness would constitute selective age-based enforcement of health and fitness requirements in violation of the ADEA, (slip op. at 6-7, App. 6a-7a), which by its express terms prohibits arbitrary age discrimination in employment. 29 U.S.C. §621(b).

The Circuit Court's opinion no where states that the PSP must test every employee or dismiss every employee that fails to meet minimum fitness qualifications. The PSP has unnecessarily *presumed* these requirements from an incorrect reading of the Circuit Court opinion. The Circuit Court has only stated that where the PSP attempts to rely upon good health and physical conditioning as BFOQ's, there must be some minimum standards to establish that there *are in fact* job qualifications, and some enforcement of these standards to prevent arbitrary age discrimination by only applying these standards to the older members of the force. *See, EEOC v. Commonwealth of Pennsylvania*, slip op. at 7, *citing, Trans World Airlines, Inc. v. Thurston*, 105 S. Ct. 613 (1985) (App. at 7a); *See also, Stone v. Western Airlines, Inc.*, 544 F. Supp. 33 (C.D. California 1982) (prima facia case of age discrimination may be established by showing discriminatory treatment). The PSP admits in its Petition at pages 10-11 that a trait can

only justify a mandatory retirement age if it is a trait an employer attempts to require of all employees and the employer does not discriminately apply higher standards to older employees. In light of this admission it is hard to imagine why the PSP has attempted to justify retiring Lieutenant Binker for failing to possess some yet undetermined level of fitness when it admits no minimum fitness standards exist to date.

b. The Third Circuit Opinion Is In Accord With The ADEA Which Requires That Cases Be Decided on An Individual Basis.

The PSP also argued that a writ should issue because the Third Circuit has now opened the new and important question of what evidence an employer must provide of its commitment to a bona fide job qualification to avoid violations of the ADEA. (*See* PSP petition at pgs. 11, 20). Contrary to the PSP's arguments, the Court of Appeals' decision does not break new ground concerning the quantum of proof required of an employer for cases under the ADEA. The PSP in effect are requesting that this Court formulate a quick panacea which would permit employers to plug routine criteria into a set formula to establish compliance with the ADEA. The plain and simple answer to the PSP contention is that it must present evidence sufficient to convince a fact-finder that it has established a valid BFOQ. This is in accord with Congress' intent that problems involving age discrimination in employment be resolved on a case-by-case basis. *Criswell.* And the mere fact that evidentiary records and results may differ is of no consequence under the ADEA, so long as those results are not clearly erroneous. *Heiar v. Crawford County, Wisconsin*, 746 F. 2d. 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985).

The Third Circuit did not alter the measure of proof required by the PSP or any other Defendant. The Third Circuit simply concluded that the District Court, sitting as a fact-finder, could not conclude as a matter of law that the PSP demonstrated a valid BFOQ based upon good health and physical conditioning when the uncontradicted facts of record established that the PSP had *no* minimum fitness standards and sought to involuntarily retire its older members under fitness criteria it did not require of any other employees. Had the proof been different during the trial of this action, the PSP might have enjoyed a different result. The PSP may solve their present violations of the ADEA in any number of ways, which when submitted to a fact-finder, may produce favorable results. But this Court cannot give defendants a quick solution for all cases under the ADEA thereby depriving the fact-finder of its duty and obligation to consider all the evidence in a case. Accordingly, it is improper to ask this Court to grant certiorari to formulate a quick fix solution for defendants under the ADEA.

2. THE DECISION BY THE THIRD CIRCUIT DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS

The PSP cites the cases of *E.E.O.C. v. City of East Providence*, 798 F.2d 524 (1st Cir. 1986), *E.E.O.C. v. Missouri State Highway Patrol*, 748 F.2d 447 (8th Cir. 1984), *cert. denied*, 106 S. Ct. 888 (1985), *E.E.O.C. v. University of Texas Health Science Center at San Antonio*, 710 F.2d 1091 (5th Cir. 1983), and *Heiar v. Crawford County, Wisconsin*, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985), for the proposition that a defendant's failure to periodically test officers below the age of 60 to determine whether they

meet minimum physical qualifications does not preclude a BFOQ defense to age discrimination. The PSP contends that the Third Circuit's opinion is in conflict with these cases because it allegedly requires employers to test *all* employees to establish a BFOQ defense. This argument should once again be summarily dismissed, as previously discussed in section 1(a) *supra*, since this argument misses the mark. The Court of Appeals established no such rule as a prerequisite to a BFOQ defense.

To the extent the Third Circuit disagreed with the Court in *East Providence*, its statements were only designed to address the arbitrary age-based enforcement of a BFOQ which is prohibited under the ADEA. Certainly, *East Providence* cannot be read to permit arbitrary age-based discrimination. Moreover, the cases cited by the PSP are factually distinguishable upon the basis that none of them presented a situation where the employer admitted it had no minimum fitness standards, yet was attempting to retire its older members based upon fitness requirements. In this respect, the present case stands alone and demonstrates a clear case of arbitrary age-based discrimination, which is not in conflict with the cases cited by the PSP.

3. THE THIRD CIRCUIT'S CONCLUSION THAT THE DISTRICT COURT COMMITTED CLEAR ERROR IN FINDING THAT THE PSP DEMONSTRATED A BFOQ SHOULD NOT BE THE BASIS FOR GRANTING CERTIORARI

(a) The PSP Has Failed To Establish Any Reasons Why the District Court's Finding of a BFOQ Should be Reviewed.

Although the PSP have presented two questions for review in its Petition for a Writ of Certiorari, the content

of its petition only addresses and argues for certiorari on the first; that being whether the Court of Appeals established a rule in ADEA cases requiring an employer to enforce minimum standards of fitness against *all* employees before it can establish a BFOQ defense. The second question seeks review of the District Court's entire findings on the BFOQ defense. Since the reasons for seeking certiorari on this second general question do not appear in the PSP Petition, it should be deemed abandoned under Supreme Court Rules 21.1(j), 21.3, and 21.5 which require that a petitioner set forth all contentions in support of a petition for a writ of certiorari in clear and concise terms in the body of the petition. Accordingly, the Respondent requests that consideration for certiorari be limited only to the first question presented by the PSP, and that certiorari be denied on that question as well.

(b) The Circuit Court Correctly Concluded That the District Court Erred in Finding That the PSP Demonstrated a BFOQ.

Consideration of the PSP's second question for review still does not warrant the granting of a writ of certiorari.

The ADEA makes it, *inter alia*, unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his employment because of the individual's age. 29 U.S.C. §623(a)(1). Age, however, sometimes must serve as a necessary proxy for neutral employment qualifications essential to an employer's business, *Criswell*, and therefore the ADEA provides a very *narrow exception* to the general prohibition against age discrimination where "age is a bona fide

occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. §623(f)(1). In *Criswell*, this Court adopted a two-prong test to determine when age-related employment criteria could be used as a proxy for a BFOQ. Under *Criswell*, an employer must first show that a job qualification which he invokes to justify age discrimination must be "reasonably necessary" to the essence of his business, and second, that the employer is compelled to rely upon age as a proxy for the job qualification validated in the first inquiry. *Id.* The relevant criteria for determining the second prong of this test were not disputed by the parties. The District Court's finding under the first prong, however, was the subject of the Third Circuit's review.

The standard employed under the first prong is one of "reasonable necessity" not just "reasonableness." *Criswell*, and *E.E.O.C. v. State of New Jersey, 620 F. Supp. 977 (D. N.J. 1985).* An employer attempting to establish a qualification "reasonably necessary" to its business is required to present a *particularized factual showing* with respect to each element of the BFOQ defense. *Id., citing Johnson* and *Criswell.* An employer therefore may not rely solely upon the truism that physical fitness declines with age. *Id.* He must show that the age limit is based on "actual occupational qualifications." *Johnson*, 105 S. Ct. at 2724.

In the present case, while the District Court found that good health, physical fitness, strength and dexterity were qualifications reasonably necessary to the essence of PSP business, it did not indicate what level or minimum level of these traits were necessary to the performance of a state police trooper's occupation. *E.E.O.C. v. Commonwealth of Pennsylvania, slip op.* at 7, (App. 7a). This omission precluded a finding of a

BFOQ. Even when the essence of an employer's business is safety, "the reasonable necessity of employing only individuals in top physical condition may not be presumed." *State of New Jersey*, 620 F. Supp. at 982.

Certiorari on this issue should not be granted since the PSP admits that an employer should "provide sufficient evidence to justify the finding of a reasonably necessary job qualification" by introducing "some evidence of its commitment to these qualifications." PSP petition at p. 19. The PSP also acknowledges that a plaintiff could "counter this presentation . . . with evidence that the employer's actual practice belies its claim of reasonable necessity." *Id.* What is most significant, however, is the PSP's admission that it has no minimum fitness standards. The absence of any fitness standards by definition belies the contention that the PSP can rely upon fitness as "reasonably necessary" to the essence of its business to establish a BFOQ defense under the ADEA. While the general proposition—that good health is a qualification desirable for the job of state trooper—may pass muster under a "reasonable" test, "reasonable necessity" requires more. The District Court clearly erred when it did not determine what level of physical fitness was reasonably necessary to the job of a Pennsylvania state trooper.

(c) The Circuit Court Opinion Does Not Require that Certiorari Be Granted To Review the Entire BFOQ Defense.

The Third Circuit properly concluded that the PSP had violated the ADEA by attempting to retire officers through selective age-based enforcement of fitness requirements which it did not require of any members of its force and when it had no minimum fitness standards

as a qualification for troopers keeping their jobs. This type of arbitrary discrimination is in and of itself prohibited by the ADEA, (*see* section 1(a) *supra*), and this Court therefore need not address the second question presented by the PSP in its petition.

CONCLUSION

For all the foregoing reasons, the Respondent, Lieutenant Otto J. Binker, by and through his attorneys, respectfully requests that this Court deny the Pennsylvania State Police Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,

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No. 87-958

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In the Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND LIEUTENANT OTTO J. BINKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners established that a mandatory retirement age of sixty for state police officers is "a bona fide occupational qualification reasonably necessary to the normal operation" of the Pennsylvania State Police, within the meaning of Section 4(f)(1) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. III) 623(f)(1).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

EEOC v. *City of East Providence*, 798 F.2d 524 (1st Cir. 1986) 6, 7, 8
EEOC v. *Missouri State Highway Patrol*, 748 F.2d 447 (8th Cir. 1984), cert. denied, 474 U.S. 828 (1985) 7
EEOC v. *University of Texas Health Science Center*, 710 F.2d 1091 (5th Cir. 1983) 7
Johnson v. *Mayor of Baltimore*, 472 U.S. 353 (1985) 2, 3, 6
Western Air Lines, Inc. v. *Criswell*, 472 U.S. 400 (1985) .. 2, 3, 5, 6, 7

Statutes:

Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. III) 621 *et seq.*:
§ 4(a)(1), 29 U.S.C. 623(a)(1) 2
§ 4(f)(1), 29 U.S.C. (& Supp. III) 623(f)(1) 2

Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342:
§ 3(a)(i), 100 Stat. 3342 (to be codified at 29 U.S.C. (Supp. IV) 623(i)) 8
§ 3(b), 100 Stat. 3342 (to be codified at 29 U.S.C. (Supp. IV) 623 & note) 8
§ 5(a), 100 Stat. 3343 9
§ 5(b), 100 Stat. 3343 9
§ 5(c), 100 Stat. 3343 9
§ 7(b), 100 Stat. 3345 (to be codified at 29 U.S.C. (Supp. IV) 621 note) 8

Pa. Stat. Ann. tit. 71, § 65(d) (Purdon Supp. 1987) 2

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 829 F.2d 392. The opinion of the district court (Pet. App. 36a) is reported at 645 F. Supp. 1545.

JURISDICTION

The judgment of the court of appeals (Pet. App. 37a) was entered on September 21, 1987. A petition for rehearing was denied on October 19, 1987 (Pet. App. 39a). The petition for a writ of certiorari was filed on December 11, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under Pennsylvania law, all state police troopers with 20 years of service must retire at age sixty (Pa. Stat. Ann. tit. 71, § 65(d) (Purdon Supp. 1987)). In 1983, the Equal Employment Opportunity Commission (EEOC), on behalf of all persons adversely affected by that mandatory retirement law, and Lieutenant Otto J. Binker of the Pennsylvania State Police (PSP), on his own behalf, brought separate actions (subsequently consolidated) in the United States District Court for the Middle District of Pennsylvania challenging the validity of the law under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. (& Supp. III) 621 *et seq.* Section 4(a)(1) of the ADEA makes it unlawful for an employer "to discharge any individual * * * because of such individual's age" (29 U.S.C. 623(a)(1)).

Following a trial, the district court denied relief on the ground that the Commonwealth's mandatory retirement age for state police officers does not violate the ADEA. See 596 F. Supp. 1333 (M.D. Pa. 1984). The court agreed with petitioners that the mandatory retirement age falls outside the scope of the ADEA's ban on age discrimination because it is a "bona fide occupational qualification" (BFOQ), within the meaning of Section 4(f)(1) of the ADEA (29 U.S.C. (& Supp. III) 623(f)(1)), which exempts "reasonably necessary" BFOQs from that ban. See 596 F. Supp. at 1336-1348.

2. The court of appeals vacated the district court's decision and remanded for reconsideration in light of this Court's intervening decisions in *Johnson* v. *Mayor of Baltimore*, 472 U.S. 353 (1985) and *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400 (1985). See 768 F.2d 514 (3d Cir. 1985). In *Johnson* and *Criswell*, this Court endorsed a two-part inquiry that requires an employer relying on a

BFOQ defense to make a "particularized, factual showing" that, first, "the job qualifications * * * [are] reasonably necessary to the essence of his business" and, second, "the employer is compelled to rely on age as a proxy for the * * * job qualifications validated in the first inquiry" (see 472 U.S. at 362; 472 U.S. at 413, 414 (citation and emphasis omitted)). The court of appeals concluded that remand was warranted because the district court had apparently assumed that good health and physical strength are job qualifications reasonably necessary to the essence of the PSP's operations and had not made the required particularlized factual findings (see Pet. App. 4a).

3. On remand, the district court again concluded (Pet. App. 11a-36a) that petitioners had not violated the ADEA because the Commonwealth's mandatory retirement age for state police officers is a BFOQ. The court found (*id.* at 15a) that "[g]ood health and physical fitness, strength, and dexterity are job qualifications reasonably necessary to the essence of the State Police business" (see *id.* at 15a-21a, 27a-31a). The court also found (*id.* at 21a) that petitioners "are compelled to rely on the mandatory retirement of officers at age 60 as a proxy for individual testing of older officers for the presence of the good health, physical fitness, strength and dexterity required to perform the job of a state police officer" (see *id.* at 21a-27a, 31a-35a).

4. The court of appeals reversed (Pet. App. 1a-10a). The court concluded that the district court's finding that good health, physical fitness, strength, and dexterity are job qualifications reasonably necessary to the essence of the operation of the state police is clearly erroneous. According to the court of appeals (*id.* at 8a), "[t]he factual findings supporting the district court's treatment of the first prong of the BFOQ defense do not include the determination that the department in fact presently requires all

state troopers to maintain a minimum level of health and fitness. Nor would the record support such a finding." "Before a characteristic can be a reasonably necessary BFOQ," the court held (*id.* at 9a), "it must be a trait that the employer at least attempts to require of employees of all ages." Hence, the court concluded (*id.* at 8a), "[u]ntil minimum standards are developed, implemented and enforced, the PSP cannot justify its mandatory retirement law by relying on good health and physical conditioning as BFOQs reasonably necessary to PSP business." The court stressed (*id.* at 9a) that the record in this case suggests that most of the younger officers did not possess the purported BFOQs.

ARGUMENT

The decision of the court of appeals, holding that the district court clearly erred in finding that the first prong of the *Criswell* test had been met, is both correct and highly fact-specific. Although it is inconsistent with the decision of another circuit, the continuing importance of the conflict has been greatly diminished by recent amendments to the ADEA, which prospectively exempt from Section 4(a)(1)'s ban on age discrimination state and local mandatory retirement laws that apply to law enforcement officials. Accordingly, the petition should be denied.

1. As the court of appeals explained (Pet. App. 9a), a trait can justify a mandatory retirement age only if it is a trait that an "employer at least attempts to require of employees of all ages." The court of appeals noted (*id.* at 7a), however, that the Commonwealth has "admitted that it presently has no mandatory minimum fitness standards." The absence of any standards relating to fitness, health, strength or dexterity—whether enforced or not—was supported in the record not only by petitioners'

admission, but by the failure of the district court to indicate what minimum level of particular traits is necessary to the performance of state trooper duties (*ibid.*), and by suggestions in the record that most of the younger officers do *not* possess the purported BFOQs (*id.* at 9a).[1] In addition to the fact that no such standards or requirements were even in existence, the court commented on the absence of any implementation or enforcement program, especially with regard to fitness (*id.* at 8a-9a). The court of appeals further made clear its view that the ADEA "does not require perfect monitoring and maintenance of a particular qualification at all age levels" (*id.* at 6a). Contrary to petitioners' claim (Pet. 12), the court cannot fairly be said to have held that the first prong of *Criswell* is satisfied only where minimum standards of health and fitness are developed, implemented, and enforced, through "regular testing," and "sanctions and eventual dismissal of non-qualifying employees."

Hence, it was the total absence in the record of either a "particularized factual showing" or any evidence to support a finding that petitioners had in effect any require-

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[1] Contrary to petitioners' suggestion (Pet. 11 n.7), the evidence in the record does not support, and the district court did not specifically find, either that "younger employees * * * are capable of" performing the tasks from which the Commonwealth deduced the type of fitness skills required for a state police officer, or that petitioners assign to "limited duty status" all officers with "medical deficiencies" that render them unable to perform the duties of a state trooper. With regard to the latter, the district court found (Pet App. 20a-21a) only that there was some "limited monitoring of the health and fitness" of state police officers and a "limited duty status program" for "temporarily disabled" officers. As the court of appeals found (*id.* at 8a (emphasis in original)), "[t]he district court's findings primarily concern the *health* of [state police] officers, not their fitness levels" and the district court made no finding that the troopers must maintain a minimum level of health and fitness.

ments relating to the health and fitness of employees, that properly prompted the court of appeals to reject petitioners' BFOQ defense. See *Johnson* v. *Mayor of Baltimore*, 472 U.S. at 362. The decision of the court of appeals is therefore both fact-specific and represents a reasonable construction of this Court's decisions.[2]

2. While there is some basis—because of the fact-specific character of the court of appeals' holding—on which to contend that no square circuit conflict exists, substantial inconsistency exists between the decision of the court below and the decision of the First Circuit in *EEOC* v. *City of East Providence*, 798 F.2d 524 (1986).[3] The First Circuit's decision focuses primarily on the dispensability of fitness testing (798 F.2d at 530) to the legality of a mandatory retirement program, and in that respect differs in

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[2] *Criswell* involved a mandatory retirement age used as a proxy for the increased tendency to "possess traits of a physiological, psychological or other nature which preclude safe and efficient job performance" by a flight engineer (see 472 U.S. at 407-408). In affirming a judgment for the plaintiffs, the Court did not fault the jury instructions for failing to require that the employer prove the existence of basic standards requiring that all flight engineers be free of such traits. The jury instructions may have lacked such a requirement in part because the employer sought to justify its practice on the ground that there was no effective way to test for the risk of sudden heart attack or other events imperiling passenger safety, let alone to articulate a basic minimum standard (see 472 U.S. at 406). In this respect, that case differs from this one, where at least some aspects of the qualities of fitness, strength, and dexterity can be stated in terms of minimum requirements. In any event, this Court's omission in *Criswell* to fault the lower courts for failing to require the existence, where feasible, of generally applicable minimum standards, does not necessarily indicate approval of that practice, since the judgment was against the employer.

[3] The court of appeals was explicit in "reject[ing] the analysis in *EEOC* v. *City of East Providence*" (Pet. App. 9a). The First Circuit in

emphasis from the instant case. However, it also appears to have involved a program, like that involved here, where no identifiable fitness and health standards had been formulated. That the program was upheld in *City of East Providence* notwithstanding that fact places the decision in conflict with the instant case.

City of East Providence, on the other hand, noted (798 F.2d at 530) that the "city's acceptance of low physical standards, coupled with other facts, might persuade a district court that physical fitness was not deemed a necessary job qualification by that police force."

The decisions of the Third Circuit in this case and of the Eighth Circuit in *EEOC* v. *Missouri State Highway Patrol,* 748 F.2d 447 (1984), cert. denied, 474 U.S. 828 (1985), are distinguishable in a more fundamental respect. The Eighth Circuit's discussion of the legal relevance of physical examinations and fitness programs, which it discounts, is confined to the second prong of the BFOQ analysis (see 748 F.2d at 453-454). The Third Circuit's ruling in this case, however, is concerned exclusively with the first prong. The Eighth Circuit's first-prong analysis, moreover, subjected the job qualifications at issue only to the most cursory scrutiny (see *id.* at 451) and, for that reason, would seem plainly contrary to this Court's subsequent decision in *Criswell,* which concluded that a "rational basis" scrutiny was not adequate under either prong (see 472 U.S. at 418-420 & n.30, 421-423).

Contrary to petitioners' claim (Pet. 14), the decision of the court of appeals does not conflict with the Fifth Circuit's decision in *EEOC* v. *University of Texas Health Science Center,* 710 F.2d 1091 (1983). The court of appeals in this case has not disputed the Fifth Circuit's ruling in *University of Texas* that "the ability of individuals to perform effectively can * * * be balanced against the need to fill vacancies" (710 F.2d at 1096). In that case, however, unlike this case, the question presented was whether the state employer could relax its fitness requirements by raising its mandatory retirement age ceiling without defeating its claim that fitness requirements were necessary. This case presents the distinct question, not raised in *University of Texas,* whether an employer has met the threshold requirement of establishing that fitness and other standards even exist for employees other than those of retirement age.

3. Any dispute between the court of appeals in this case and the First Circuit is of little continuing importance, however. In 1986, after *City of East Providence* had been decided, Congress amended the ADEA to allow, in effect, a state and local government to apply prospectively the very type of mandatory retirement law at issue in this case pending the results of a congressionally-mandated study. Section 3(a)(i) of the Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342, provides that it is not unlawful for state or local government "to discharge any individual because of such individual's age if such action is taken—(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and—(2) pursuant to a bona fide * * * retirement plan that is not a subterfuge to evade the purposes of [the ADEA]" (to be codified at 29 U.S.C. (Supp. IV) 623(i)).

This amendment, which became effective on January 1, 1987, and remains in effect through 1993,[4] does not apply to actions, such as this one, which were brought under the ADEA before its effective date (see Pub. L. No. 99-592, § 7(b), 100 Stat. 3345 (to be codified at 29 U.S.C. (Supp. IV) 621 note)). In confining the continuing significance of the question presented in this case to those few suits for retrospective relief that were brought against state and local governments before January 1, 1987, the amendment renders the circuit conflict a matter of little continuing importance.[5]

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[4] The amendment will cease to be effective on December 31, 1993, unless reenacted. See Pub. L. No. 99-592, § 3(b), 100 Stat. 3342 (to be codified at 29 U.S.C. (Supp. IV) 623 & note)).

[5] The 1986 amendment applies with regard to state and local mandatory retirement laws pertaining to firefighters and law enforcement

The 1986 amendments also require that the EEOC and Secretary of Labor study whether physical and mental tests can validly measure the ability of law enforcement officers and firefighters to perform their jobs, and to report the results of that study, along with recommendations regarding specific standards that such tests should satisfy, to Congress within four years. See Pub. L. No. 99-592, § 5(a) and (b), 100 Stat. 3343. The EEOC is instructed to propose guidelines within five years "for the administration and use of physical and mental fitness tests to measure the ability and competency of police officers and firefighters to perform the requirements of their jobs" (§ 5(c), 100 Stat. 3343). Congress, therefore, has itself determined that, if valid, tests of physical and mental fitness should be used and administered in the law enforcement area when the current exemption from the age discrimination ban is lifted.

Notwithstanding the conflict in the courts of appeals, therefore, the decision below does not warrant further review.

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officers, but not to private employees of similar occupations, as to whom cases raising comparable BFOQ issues are rare.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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October Term, 1987

(5)

No. 87-958

Commonwealth of Pennsylvania, et al, Petitioners

v.

Equal Employment Opportunity Commission and
Lieutenant Otto J. Binker

REPLY BRIEF FOR COMMONWEALTH, PETITIONER, TO BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

ARGUMENT 1

CONCLUSION 9

TABLE OF AUTHORITIES

CASES: Page(s)

E.E.O.C. v. City of East Providence, 798 F.2d 524 (1st Cir. 1986) . 3,8

E.E.O.C. v. Missouri Highway Patrol, 748 F.2d 447 (8th Cir. 1984), cert. denied, 474 U.S. 828 (1985). 3,8

E.E.O.C. v. New Jersey, 631 F. Supp. 1506 (D.N.J. 1986), sum. aff'd, 815 F.2d 694 (3rd Cir. 1987) 6,8

Heiar v. Crawford County, 746 F.2d 1190 (7th Cir. 1984), cert. denied, 472 U.S. 1027 (1985) 8

Ievolino v. Delta Air Lines, Inc., 796 F.2d 1408 (11th Cir. 1986). 3

Inwood Laboratories, Inc. v. Ives Laboratories, 456 U.S. 844 (1982) 2

STATUTES:

The Age Discrimination Employment Amendments of 1986, P.L. No. 99-592, §3(a), (b), 100 Stat. 3342 (codified at 29 U.S.C.A. 623(i) & note (West Supp. 1987)) 6

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REPLY BRIEF FOR COMMONWEALTH, PETITIONER TO BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Petitioners, the Commonwealth of Pennsylvania, Pennsylvania State Police and the Commissioner of the Pennsylvania State Police, submit this reply to the briefs of Respondents in opposition to the petition for a writ of certiorari.

ARGUMENT

Respondents Equal Employement Opportunity Commission (EEOC) and Lieutenant Binker have raised two arguments in opposition to the grant of certiorari. First, they claim that this case is primarily factual and unworthy of this Court's review because the Third Circuit did no more than overturn a district court's factfinding as clearly erroneous. Second, they claim that statutory developments have made the question, and circuit conflict, presented by this case unimportant. Both these claims are disingenuous.

1. At the district court level, this case certainly was primarily one of fact. The case involved eighteen days of testimony, 114 exhibits, 2319 pages of transcripts. The district court made sixty detailed findings of fact. Noticeably absent from the Third Circuit opinion, however, is any discussion of the evidence except in the greatest generalities. The Court of Appeals is not a place for factfinding. See Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 856 (1982) (Court of Appeals may not reverse trial court for improperly weighing evidence). If the Third Circuit truly wanted to reverse because the district court had improperly weighed the evidence, it had at least an obligation to provide a detailed discussion of that evidence.

Rather than weighing the evidence, the Third Circuit seized on undisputed factual issues--as the court itself noted (7a) and as the EEOC agrees (Brief for the Federal Respondent in Opposition 4). The parties do not dispute that the Commonwealth presently lacks specific, quantitative, minimum physical fitness standards that it requires younger troopers to meet. The question for this court is whether such standards are required. The Respondents, and the court below, appear to believe that a reasonably necessary job qualification can exist only in the form of specific, minimum standards (or "requirements" as the EEOC puts it). But no such standards have been present in myriad other age discrimination cases,

in which other circuits have held for the defendant./1

As we explain in our petition, no such standards should be necessary: (1) because the Commonwealth has no feasible way to test for the presence or absence of these standrds, and (2) because specific minimum fitness standards would represent an arbitrary oversimplification of the Commonwealth's need for physically capable state police. The evil raised by the Respondents and the court below is selective, discriminatory enforcement of fitness qualifications. But no selective enforcement of fitness qualifications occurs if an employer requires the retirement of over-aged officers because those officers, on the whole, are far less capable than younger of officers of maintaining fitness characteristics reasonably necessary for the job.

Furthermore, the absence of a specific, quantitative, fitness requirement does not imply the absence of non-quantitative fitness qualifications. The district court specified those qualifications in this case, inter alia, as the aerobic capacity to pursue victims, the strenth to

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1. See e.g., EEOC v. City of East Providence, 798 F.2d 524 (1st Cir. 1986) (discussed in the petition at 12); Ievolino v. Delta Air Lines, INc., 796 F.2d 1408 (11th Cir. 1986) (upholding age requirement for flight engineers without mention of fitness standards); EEOC v. Missouri Highway Patrol, 748 F.2d 447 (8th Cir. 1984) (discussed in the petition at 13-14), cert. denied, 474 U.S. 828 (1985).

disengage automobiles or to drag victims from dangerous situations, the reflexes to handle firearms and automobiles, and the freedom from disabiling disease that would compromise an individual's ability to perform under stress (17a). As we discussed in the petition at 11 n.7, the Commonwealth makes many efforts, short of individualized testing, to assure the physical fitness of officers below retirement age. Any claim, therefore, that the Commonwealth simply failed to identify fitness qualifications or that the Commonwealth makes no attempt to assure that officers remain fit is unsupported by the record or the district court's findings. And while putting numbers to these fitness qualifications is somewhat arbitrary, the district court found that the lack of strength and aerobic capacity and relatively high likelihood of silent heart disease make officers over sixty sufficiently less capable of meeting these qualifications to justify age as a BFOQ.

Indeed, far from a factual case, Respondents can muster only one statement in the Third Circuit opinion that even approaches the factual. The Third Circuit noted that the record "suggests" that most younger officers did not possess the requisite fitness qualifications (9a)./2 This is an inaccurate presentation of the record and the Third Circuit noticeably did not rest its opinion upon this "finding." But even the relevant

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2. This observation alone vitiates the EEOC's claim that no qualifications existed. Officers could only fail to meet qualifications if qualifications exist.

arguments on this point presented to the Third Circuit by the EEOC point to the legal, not factual, significance of this case.

To argue that under-aged troopers lacked fitness qualifications, the EEOC relied on test results of different aged state troopers./3 The tests had consisted of different components, and as the EEOC argued to the Third Circuit, many officers under age sixty had problems with two components, the shot put and obstacle course. But the officers highlighted by the EEOC as having such difficulties were primarily officers over aged forty and themselves protected by the Age Discrimination Act (Brief of the EEOC before Court of Appeals at 11)./4 Furthermore, their abilities declined enormously between ages forty and sixty.

In essence, therefore, the EEOC argued that sixty could not serve as a mandatory retirement age because many troopers approaching that age would suffer from similar infirmities. That

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3. The EEOC had argued before the district court, and the district court had agreed, that these test results were invalid because of testing methodology (26a-27a). Because these test results formed the basis of the EEOC's claim that younger officers did not meet the desired qualifications, the EEOC's claim, and the Third Circuit's suggested finding, lack even minimal evidentiary support.

4. The other group that failed some of the test components consisted of women.

observation is obvious. Sixty is not a magical, fitness turning point. The significant fact is not that some officers under aged sixty failed to meet all the desired fitness traits but that the ability of officers as a whole to meet desired fitness traits declines enormously by age sixty./5 It is the over-aged officers' likely deviation from the desired fitness traits that makes their employment a danger to public safety.

Under the EEOC's analysis, Pennsylvania could probably establish a mandatory retirement age of forty, but not of sixty. The evidentiary argument made by the EEOC therefore only underscores the reasons not to require an employer to establish arbitrary, minimum physical fitness standards. Far from protecting the over-aged, the EEOC analysis provides an incentive for harsher treatment of several categories of workers under a mandatory retirement age: those approaching the retirement age, the disabled, in some cases, women. As the district court observed in EEOC v. New Jersey, 631 F. Supp. 1506, 1509 (D.N.J. 1986), sum. aff'd, 815 F.2d 694 (3d Cir. 1987), "it comes with some ill grace for the EEOC in the course of raising the rights of one group to suggest that others should be precipitously discharged."

II. The EEOC also argues that the Age Discrimination in Employment Amendments of 1986,

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5. As the EEOC admitted in its brief to the Third Circuit, no officers over age sixty passed all the components of the test even when test results were discounted by 25%.

Pub. L. No. 99-592, 100 Stat. 3342, § 3 (codified at 29 U.S.C.A. § 623(i) & note (West Supp. 1987)), makes the circuit conflict in this case "a matter of litle continuing importance" (EEOC's Br. at 8).

This argument is false for three reasons. First, the issue at stake in this case is a fundamentally important, generic, BFOQ issue that does not turn on its law enforcement context. The EEOC did not, on appeal, contest the objective evidence used to show that physical fitness requirements were reasonably necessary. Nor did the EEOC take issue with the district court's conclusion that individualized testing was impractical. All the EEOC contended was that Pennsylvania could not rely on the objectively reasonable fitness qualifications because it did not quantify those qualifications into particular, minimum standards and make meeting those those standards a requirement of employment. Thus, none of the issues particular to law enforcement or firefighting are present. Instead, the issue in this case is whether an employer that wishes to maintain a mandatory retirement age must "implement and enforce" (8a) arbitrary minimum standards of fitness.

Second, Congress is not studying the issue presented by this case. The Act directs the EEOC to study whether tests can validily measure the ability of law enforcements officers and firefighters to perform their jobs, and to propose guidlines for such tests if feasible. Pub. L. No. 99-592 § 5, 100 Stat. 3343. These instructions, which presume the reasonable necessity of physical fitness qualifications and which go only to prong two of the BFOQ test, again are not at issue in this case. Far from hindering Congress'

analysis, Congress would presumably benefit from having this important, hidden issue raised for public attention.

Finally, the EEOC's conduct in relentlessly pursuing cases of this kind belies its claim of unimportance. In at least six ongoing cases cited in the Petition at 21, in this case, and in at least five other decided circuit court opinions,/6 the EEOC has made the necessity for specific minimum employment standards a focus of its charges in law enforcement or firefighting cases. Because the Act does not apply to acts brought before its effective date, January 1, 1987, law enforcement officials face millions of dollars in potential liability for lacking these specific, minimum standards. Even while discouraging this Court's review, the EEOC is attempting to establish long-term precedents for the determination of BFOQ's, which will make mandatory retirement ages difficult, if not impossible, to defend.

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6. See EEOC v. City of East Providence; EEOC v. New Jersey, 631 F. Supp. 1506 (D.N.J. 1986), sum. aff'd, 815 F.2d 694 (3d Cir. 1987) (the Third Circuit errenously stated in this case that the defendants there had fitness standards in place); EEOC v. Missouri Highway Patrol; Heiar v. Crawford County, 746 F.2d 1190 (7th Cir. 1984), cert. denied 472 U.S. 1027 (1985).

CONCLUSION

The petition for a writ of certiorari should be granted.

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